Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LOUIS SPITALIERI,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORPORATION,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Section 922 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., and extensions, in a case of modification of a prior compensation order, directs that prior payments shall be unaffected, except that an award may be made retroactive to the date of accident in the event of an increase in the rate of compensation or a decrease in the rate of compensation. The issue in this case is, when a subsequent order terminates benefits entirely, if, and under what circumstances, it may be given retroactive effect. This Court has never considered this issue.

At issue is whether this Court's doctrine of deference to the statutory interpretation to the administrator of an agency applies, under *Chevron U.S.A v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies when there exists no regulation, prior evidence of such interpretation, the involved statutory provision does not require regulation, and the administrator has not participated in the original litigation, first announcing the interpretation before the circuit court.

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PETITION FOR A WRIT OF CERTIORARI

Philip J. Rooney, on behalf of Louis Spitalieri, respectfully petitions for Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in the captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 1-15) is reported at 226 F.3d 167. The decision of the Benefits Review Board of October 7, 1999 (App. pp. 15-27) is contained at 1999W2102 1752-DOL and is unofficially reported at 33 BRBS 164. The decision of the Benefits Review Board of February 23, 1999 (App. pp. 42-49) is contained at 1999W21229 23 DOL and is unofficially reported at 33 BRBS 6. The decisions of the Administrative Law Judge of February 6, 1998 (App. pp. 50-54) and January 15, 1998 (App. pp. 55-90) are unreported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was dated September 21, 2000. Said decision reviewed orders of the Benefits Review Board, United States Department of Labor, pursuant to 33 U.S.C. 921(c). Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTES AND REGULATION

33 U.S.C. 922 provides:

Modification of Awards

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under Section 908(f) of this title), on the ground of a change in conditions or because of a mistake in determination of fact by the deputy commissioner, the deputy commissioner may, at any time, prior to one year of the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of the claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto an excess of such decreased rate shall be deducted from any unpaid compensation and such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

Section 33 U.S.C. 908 states, in relevant part:

> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 percentum of the average weekly wages shall be paid to the employee during the continuance thereof.
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66 2/3 percentum of the average weekly wages, which shall be in addition to compensation for temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee as follows: . . .
>
> (13) Loss of hearing:
>
> (B) Compensation for loss of hearing in both ears, two hundred weeks

20 C.F.R. 702.373 (Regulations under the Longshore and Harbor Worker's Compensation Act, as Extended), states, in relevant part:

> Modification of awards
>
> (a) . . . Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made retroactive from the date of injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in

such manner and by such method as may be determined by the district Director or the administrative law judge. Settlements cannot be modified.

* * *

(c) review of a compensation case may be had only for the reason that there is a change in condition or that there was a mistake in a determination of fact.

STATEMENT OF THE CASE

This case involves the proper interpretation of the effect on prior benefits awarded when modification, pursuant to Section 922 of the Longshore and Harbor Workers' Compensation Act, is granted of a prior order, based upon a change in condition and the applicability of this court's doctrine of deference to the interpretation of that statute by the Director, Office of Workers' Compensation Programs, United States Dept. of Labor.

The petitioner, Louis Spitalieri, was injured April 10, 1992, while employed as a longshoreman, entitling him to benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. There arose a dispute as to further disability and, after litigation, the claimant was awarded benefits, pursuant to 33 U.S.C. 908(b), for temporary total disability, by an Administrative Law Judge on November 15, 1993 (App. 3).

On July 10, 1996 the employer moved for suspension of benefits, having obtained new medical reports, based solely on a change in claimant's condition, pursuant to 33

U.S.C. 922. After further litigation, a second administrative law judge found that there was a change in the claimant's condition and that he was not entitled to further benefits and suspended benefits as of August 31, 1994 (App. 89-90). By decision on reconsideration the same administrative law judge found claimant entitled to a binaural loss of hearing of 6.9%, pursuant to 908(c)(13)(B) of the Act. Temporary total disability benefits had been paid by the employer to January, 1998. The administrative law judge granted the Employer a credit against the permanency award of all benefits paid after 8/31/94.

The Longshoreman appealed the original decision and decision on reconsideration to the Benefits Review Board, in accordance with 921(b)(3). The Benefits Review Board, by decision dated February 23, 1999, upheld the decision of the administrative law judge relative to the issue of disability and modification, but found that the Administrative Law Judge improperly granted the employer a credit retroactive to the date of termination of disability because section 922 requires that payments should be made up to the date of the order on modification and that the claimant was entitled to an additional award for his loss of hearing.

Upon the employer's request, the entire board considered the matter en banc. A majority of the Board interpreted the plain language of section 922 as permitting retroactive modification of benefits only in the event of an increase or a decrease in the compensation rate, not in the case of a suspension (App. 16-27). The minority of the Board dissented. The Benefits Review Board never considered the issue of retroactivity in the context of

whether the modification was based on a change in conditions or mistake in finding of fact, but stated that the plain language of the statute permitted retroactive modification of awards only in the event of an increase or decrease in the rate of compensation, not in the case of a complete suspension of benefits.

The Director, Office of Workers' Compensation Programs never appeared nor participated in this litigation nor was the issue of deference to the Director's interpretation of section 922 urged by any party, as such interpretation apparently did not then exist.

The employer sought review in the United States Court of Appeals for the Second Circuit (the circuit within which the injury occurred), pursuant to 33 U.S.C. 921(c).

The Director, Office of Workers' Compensation Programs, United States Department of Labor, the administrative of the Longshore program now made an appearance.

The employer argued, as a matter of statutory interpretation, that Section 922 permitted a retroactive modification of benefits because the term decrease, comprehend a "suspension" of benefits.

The Director announced that its interpretation of Section 922 accorded with that of Employer and was entitled to deference. The Director also claimed that the Board's interpretation of the statute was contrary to its longstanding actual implementation (App. 14).

The Longshoremen argued, based upon legislative history, the clear reading of the statute, and principles of

statuatory interpretation, that a retroactive change in the benefits is permitted only when modification grants an increase in the compensation rate or a decrease in the compensation rate and that when modification is granted based on change in conditions that prior payments are unaffected and that the Longshoreman was entitled to the permanency aware in addition to the temporary total disability benefits paid by the employer.

The Second Circuit reversed the Benefits Review Board (App. pp. 1-15). The court specifically stated that it was granting deference to the Director's reasonable interpretation of the statute (App. pp. 7, 8) and accepted the Director's claim that the Board's interpretation of 922 was contrary to longstanding actual implementation and interpretation (App. pp. 14).

ARGUMENT

THE SECOND CIRCUIT'S INTERPRETATION OF SECTION 922 IS CONTRARY TO THE CLEAR READING OF THE STATUTE AND CAUSES UNCERTAINTY IN ADJUDICATION

There is a principle of finality in cases under the Act, 33 U.S.C. 921(a). 33 U.S.C. 922 displaces traditional notions of *res judicata* in such cases, *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, rehearing denied, 391 U.S. 921 (1968). That section, as originally enacted, permitted modification only on the ground of a "change in conditions", *1927 44 Stat 1437*. Logically, the original section also permitted suspension, reduction, or increase

in the award but proscribed prior payments being affected.

Section 922, as originally written, mirrored section 22 in the Workers' Compensation law of the State of New York, which, likewise, limited modification to a change in condition and prohibited retroactive modification of prior awards, unless there was a change in average weekly wage, see *Schafer v. Buffalo Steel Car Corporation*, 250 NY 507 (1929). That the language of the Federal and state statutes bore a close relationship is not surprising since the Longshore and Harbor Workers' Compensation Act was based upon the New York Workers' Compensation Law, *Potomic Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 274-275 (1980).

The amendments of the relative statutes tended to mirror each other. In 1927 New York modified its statute to permit a change in the award, on the additional ground: "that the previous classification was erroneous and not in the interest of justice.", *Workers' Compensation Law of the State of New York*, section 14(6-a), *Laws of the State of New York*, 1927, Ch. 557.

Therefore, in 1934 Congress amended the Federal section 922 to permit modification on the ground of " . . . a mistake in determination of fact by the Deputy Commissioner . . . " Leaving intact, the prior language that modification based upon a change in conditions should not affect prior payments, there was added the following very specific language " . . . and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation *rate* may be made effective from the date of the injury and any payment

made prior thereto in excess of such a decreased *rate* shall be deducted from any unpaid compensation . . . " 33 U.S.C. 922; 1934, see 354 Section 5, 48 Stat 87 [emphasis supplied]. The amendment also permitted retroactivity to the date of accident. The accompanying legislative report makes clear the purpose of the amendment to " . . . broaden the grounds on which a deputy commissioner can modify an award by allowing modification where a mistake in a determination of fact makes such modification desirable in order to render justice under the Act", *S.R. No. 588, 73d Cong, 2d Sess. 3-4 (1934), H.R. 1244, 73rd Cong. 2d Sess. 4 (1934).* This was the intent of the 1934 amendments, as has been authoritatively stated in *Banks v. Chicago Grain Trimmers Association,* cited above.

In the instant case, the basis for modification was for a change in conditions and temporary total disability benefits had been paid to January 20, 1998 (App. 9), the date of decision on modification. The second circuit interpreted 922 as permitting a retroactive modification of the award to February 21, 1996 when the employer obtained medical reports claiming no disability (App. 49-50). The court's interpretation effectively read out of the statute the mandate stating: "Such new order shall not affect any compensation previously paid . . . " 33 U.S.C. 922. The court claimed that the authority to make modification from the date of injury included the lessor authority to grant retroactive modification at a later date (App. 11). No recognition was extended to the mandatory language of the section that the new order " . . . shall not affect any compensation previously paid . . . " nor to the language that retroactive modification of the award "may" be

granted from the date of accident. Nothing in that sentence suggests that retroactivity is applied only to awards made modified from the date of accident, as opposed to a later date. Despite the mandatory statutory language, the court interpreted Section 922, in a case of change in conditions, to permit retroactive modification of an award to any date earlier and to any period, only provided after the date of accident (App. 10-11). No distinction was recognized between modification based on change in conditions and mistake in finding of fact.

The clear reading of the statute specifically enumerates all possible actions in the new order: awarding compensation, increasing, decreasing or terminating same. The statute is equally specific that retroactivity may be applied only in the event of an increase or a decrease in the compensation rate and only if any part of the compensation is unpaid. The clear reading of the latter provision is that in the event of a reduction of a compensation rate there must be a fund out of which the reduction may be recouped.

The court felt that this was not a reasonable interpretation of the statute because it prevents the employer from recouping an overpayment. This argument begs the question, which is whether compensation payments made under a prior order, and paid in accordance with law, are an overpayment.

Further, Congress used the words "terminate" and "decrease" in the same sentence. This clearly indicates Congress intended a different meaning to the two terms, *National Transportation Committee v. Interstate Commerce Commissions*, 683 F.2d 533 (DC Cir. 1982).

The second circuit's interpretation of Section 922 is contrary to its clear and unambiguous language. More significantly, its unique interpretation of the statute erases the distinction between modification based on changes in condition as opposed to mistakes in finding of fact. The court attempts to re-write Section 922 to permit a fact-finder to grant a retroactive modification of benefits and eliminates the statuatory mandate that the "new order shall not affect any compensation previously paid . . . " 33 U.S.C. 922.

The court's interpretation ignores the historical context of Congressional action. The language permitting retroactive modification (and only when there is a fund available for same) was placed into the statute only when the law was amended to permit modification based upon mistake in finding of fact. As the lower court itself previously noted, the language of retroactivity, by definition applies where there is a modification of a prior finding because of a mistake of finding of fact, *Jarka Corporation v. Hughes*, 299 F.2d 534 (2nd Cir. 1962). The statute, as originally written, permitted modification only based upon change in conditions and proscribed prior benefits paid being effected. Congress did not change that statutory provision in the 1934 amendments.

There was at least the suggestion that the court, partially, based its interpretation on its perception that this case was " . . . tinged with fraud" (App. 13). The substantial evidence rule prevents this Court from reviewing the administrative law judge's conclusions in this respect, which consisted of video tapes of the claimant working on his own car and the deposition and affidavit from his ex-wife and girlfriend with whom the

claimant had been in litigation. This Court, therefore, cannot decide that this interpretation of the worker is appropriate or one that is a sad commentary on the plight of an injured worker. However, the court's attitude for the injured worker is not an appropriate basis of statutory interpretation.

Acceptance of the second circuit's interpretation of section 922 would lead to uncertainty in litigation. As a practical matter, there would no longer be any distinction between modification based on changes in condition or mistake in finding of fact. There would be uncertainty relative to the status of awards under prior orders.

Finally, the second circuit's interpretation of the statute was made outside other relevant provisions of the statute. The award for schedule loss of hearing pursuant to 908(c)(13)(B) is mandated to " . . . be in addition to compensation for temporary total disability or temporary partial disability *paid* in accordance with subdivision (b) or subdivision (e) of this section . . . ", 908(c) [emphasis supplied]. The clear reading of that section is that the claimant is entitled to his schedule loss in addition to the benefits for temporary total disability previously paid, not the benefits to which a later administrative law judge believes the claimant to be entitled. The administrative law judge found the claimant was no longer entitled to temporary total disability benefits but the schedule loss is payable irregardless of the claimant's earning capacity, *Potomic Electric Co. v. Director, OWCP*, cited above at 269.

THE LOWER COURT'S INTERPRETATION OF SECTION 922 IS NOVEL, CONTRARY TO ITS OWN PRIOR HOLDING, AND INCONSISTENT WITH THE HOLDING OF THIS AND OTHER COURTS

No other court has interpreted Section 922 as did the circuit court herein. Its approach is entirely novel, and the court's decision contains more than a suggestion that it came to this conclusion based upon the equally novel interpretation of the Director, Office of Workers' Compensation Programs.

In an earlier case, the same court had stated: "However, the distinction between the section between change in conditions and mistake of fact only makes sense if the language speaking of retroactivity to the date of injury is limited to modification based upon mistake of fact", *Jarka Corporation v. Hughes*, cited above, at 536-537. The court claimed that its prior holding was only dicta and it was inapplicable to the instant case because the issue herein was change in conditions not a mistake in fact. In both respects, the court misstated its own holding in *Jarka*. In that case a prior award has been modified to award permanent total disability in 1960, relative to a 1948 injury, awarding compensation from the date of injury. The court noted where a deputy commissioner modifies a prior award retroactively, he evaluates claimant's condition differently and believes that the prior determination was incorrect and based upon mistake in fact " . . . and he cannot be making the new order because of a change in conditions.", *Jarka*, cited above, at 537. The court then noted in such a case that the greater burden of proof demonstrating how the first order was mistaken, whether due to inaccuracy of the evidence or impropriety of the

inferences – in other words, a heavier burden than change in condition. The court remanded the case to the deputy commissioner because it could not be determined from the record if the deputy commissioner found a mistake in fact or a change in condition and, were he reversed on that point, what would be the date of entitlement to increased benefits based on an *alternative* theory of change in condition. In *Jarka,* the court was interpreting section 922 as other courts had done.

In *Bethlehem Ship Building Corp. v. Cardillo,* 102 F.2d 299 (1st Cir. 1939), cert. denied, 307 U.S. 645 (1939), an award was reopened based both upon a change in conditions and mistake in finding of fact. The modified order set aside the finding of no further disability and found a total disability. However, the new order did not specify that the modification was based on change in conditions or a mistake in finding of fact. The court stated: "In other words, the new award made under Section 22 was not a retroactive application of Section 22, but a prospective one and in accordance with the laws existing at the time it was made." *Bethlehem,* cited above, at 301. No issue would have arisen were the issues solely change in conditions; the issue arose because it was the amendments of section 922 that permitted modification based on mistake in finding of fact, which is what occurred in that case.

In *Stansfield v. Lykes Bros. SS Co., Inc.,* 124 F.2d 999 (5th Cir. 1942) the District Court had reversed a modified award because the claimant, at the time of the original award, intentionally withheld information about his medical condition. However, the actual claim was for a change in conditions. As in *Bethlehem,* the court felt it was relevant whether the claim was for mistake in finding of

fact or change in condition. However, that decision of the deputy commissioner was upheld only because the evidence supported both the change in conditions and mistake in finding of facts. Both these courts recognized this sharp distinction between the two bases of reopening and the differing evidentiary burdens they bare.

Prior to the 1938 amendment, there arose the case of *Pillsbury v. Alaska Packers Assoc.*, 85 F.2d 758 (9th Cir. 1936), rev'd on other grounds, 301 U.S. (1937). In that case the employer sought modification of a finding of employer/employee relationship. The court held that that issue could not be reviewed because Section 922 limited itself to a change in the employee's physical condition. The court noted the jurisdictional issue of an employment was not a "change in conditions." The court also noted that permitting such a proceeding would frustrate the Act's principle of finality.

The court below claimed that its interpretation permitting suspension of benefits prior to the order on modification is supported by *McCord v. Cepas*, 532 F.2d 1337 (DC Cir. 1976). That reliance is entirely misplaced. There the claim was not for change in conditions but mistake in finding of fact. The court sharply delineated modification based on mistake in finding of fact as compared to change in conditions. The court also emphasized that justifying modification based on mistake in determination of fact can be a difficult burden. The court's holding, in the context of modification based on mistake, that the fact-finder either leave intact prior payments intact or set them aside, does not justify the argument the same authority exists in a case where modification is based on

change in conditions. The holdings of this Court describing the broad discretion to modify prior awards were all cases involving mistake in determination of fact, *Banks v. Chicago Grain Trimmers Assoc., Inc.*, cited above; *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971). The lower court erred, as a matter of law, by interpreting those cases as authority to retroactively modify awards when modification is based on mistake in finding of fact.

Most significant is this Court's holding in *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995) in which the employee had sustained no loss of earnings for some four years before reopening on change in conditions, to whom payments continued until suspended by an administrative law judge, apparently some years later (*Rambo* at 294). Not only was there no consideration given to a credit for an "overpayment" of many years duration, this Court later remanded the case for consideration of an additional *de minimis* award, *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997) (*Rambo II*). This Court clearly did not consider retroactivity because the modification was based on change in conditions, as herein.

The court also erred in asserting that the Board's interpretation is contrary to the actual implementation of the provision, relying on the Director's allegation thereof (App. 14). No party ever cited any case where retroactive modification of awards was permitted when modification is based on change in conditions. Aside from the instant matter, the Longshoreman is aware of no such case nor did the other parties recite such cases or evidence.

THE BROAD, UNCONDITIONAL DEFERENCE GIVEN TO THE DIRECTOR'S INTERPRETATION OF THE STATUTE IS ERRONEOUS AND CONTRARY TO HOLDINGS OF THIS AND OTHER COURTS

The reading of the language of the case below makes clear that the Second Circuit, in interpreting section 922 of the Act, quoting this Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 831 (1984), to a large degree relied on the deference doctrine. The court specifically stated that the Director's interpretation " . . . is entitled to the deference ordinarily afforded to the official charged by Congress with the responsibility for administering a benefits program." (App. 7-8). The court also accepted uncritically the Director's assertion that its interpretation of the statute had not been the subject of controversy and misunderstanding accorded with the statute's actual implementation (App. 14). So pervasive was the deference, that the court never even cited arguments brought forward by the Employer and barely at all the contentions made by the Longshoreman (App. 11).

The same court previously had accorded deference to the Director relative to the interpretation of Section 908(f) of the Act, in the case of *Director v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790 (2nd Cir. 1992).

The situation in *Bergeron* is dramatically different from the instant case. A claim under Section 908(f), for reimbursement out of the Special Fund, involves a Director as a party litigant, which Fund the Director administers, and out of which payments are made.

In the instant case, the Director's position is entirely different. First, there does not exist any regulation, memorandum, any document or any other evidence that the Director ever accorded the interpretation of Section 922 now urged by the Director. There was, therefore, no compliance with general rule making procedure and opportunity for interested parties to be heard. Secondly, the Director's interpretation was first announced in its brief to the second circuit. The Director did not previously participate in the litigation nor share its interpretation with the Benefits Review Board (if, in fact, such an interpretation even existed at that time). Thirdly, section 922 is not a statute containing technical, scientific, or other complex matter requiring interpretation and rule making, requiring the expertise of the administrator. The department's sole regulation, relative to 922, 20 C.F.R. 702.373, uses the term "retroactive" only with respect to an award increasing the compensation rate and does not otherwise interpret the statute.

While there is no question that the Director has regulation making authority, it is also true that in certain instances Congress has set forth specific authorization to implement the section by regulation, whether the complexity of the matter requires it and where the Department has in fact, made highly detailed regulation. Thus, 907(j)(1) ("Medical Services and Supplies") specifically confers such authority and there are detailed regulations at 20 C.F.R. 702.401 et seq. Section 941(b), (relative to safety rules and regulations) contains such a specific grant of rule making authority.

On the other hand 33 U.S.C. 921 contains a specific grant of authority to the Benefits Review Board and the

courts to interpret the statute. This court had not hesitated to reject the Director's interpretation where it does not conform to the Court's interpretation of the law, e.g. *Potomic Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980).

The decision below pushes back the bounds of the doctrine of deference far beyond that accepted by this Court or other circuits and, if accepted, would obviate the historic role of the courts as interpreters of the Longshore Act, the majority of whose provisions have no need for rule making or the expertise of the Director

One point merits brief discussion. The court below apparently based its deference, in part, on the claim of ambiguity in the statute (App. 7). The court, therefore, accepted what it termed the Director's reasonable interpretation of the statute. There is no ambiguity in the statute. As discussed above, Section 922 states that the order on modification " . . . may terminate, continue, reinstate, increase or decrease such compensation or award compensation." That sentence contains *all* the possibilities of an order on modification. The statute is equally clear that such an award may not affect any compensation previously paid excepting the case of an award increasing or decreasing the *rate*. Congress' intent is entirely clear. That the court below finds the result not to its liking is of no relevance to the interpretation of the statute. This Court recognized that its holding in *Potomic Electric & Power Co. v. Director, OWCP*, cited above, was harsh but was, nevertheless constrained to the results by its reading of the statute. The lower court's claim that an overpayment in benefits would result from the Board's

holding, begs the question of the statute's interpretation. By definition, whenever a prior order directs continuation of payments, there must be a passage of time between the existence of the evidence justifying modification and the actual order on modification. Yet, Congress carefully stated that the new order, with stated exceptions, " . . . shall not affect any compensation previously paid . . . " (Section 922). Therefore, it cannot be stated that the existence of a claimed "overpayment" renders the statute itself ambiguous.

This Court has specifically stated that when Congress has spoken with clarity to the precise question at issue the issue of deference does not arise, *Chevron U.S.A. Inc. v. Natural Resource Defense Council*, cited above. When this court finds Congress' terms unambiguous, judicial inquiry is complete, *Rubin v. United States*, 449 U.S. 424 (1981).

While the court below paid lip service to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, cited above, it failed to inquire if Congress had addressed the precise question at issue (which it has) and whether Congress has left a gap, either explicit or implicit, for the agency to fill (Section 922 containing no evidence of such a gap). The court below failed to take note that *Chevron* involved a highly complex and technical statute, concerning which Congress delegated explicit rule making authority. See also *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991).

At least one other circuit court has refused to interpret *Chevron* in such a broad and uncritical manner. Thus,

the Seventh Circuit stated: " . . . different statutes transferred different sorts of implementing authority to agencies, and therefore there is not one but many standards of deference when agencies interpret statutory language", *Homemakers & Shore, Inc. v. Bowen,* 832 F.2d 408, 412 (7th Cir. 1987).

The second circuit failed to take account of other holdings of this court identifying the limit of the deference doctrine. In *Immigration Naturalization Service v. Cardozo-Fonseca,* 480 U.S. 421 (1987) this Court declined to give deference to the agency's interpretation. There was quoted with approval this Court's earlier holding which stated: "the power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making or rules to fill out any gaps left, implicitly or explicitly, by Congress, *Morton v. Ruiz,* 415 U.S. 199 at 231 (1974). The court declined to apply deference because the issue was purely one of statutory interpretation and the court utilized traditional tools of statutory interpretation. The court also rejected the agency's interpretation because of the inconsistent position taken over the years (pg. 447). What of a situation in which there is no prior position taken on an issue?

In summary, section 922 is precisely the type of statute that is classically subject to judicial interpretation. This is not a case in which an administrator's interpretation is required relative to " . . . manifestly competing interest . . . regulatory scheme is technical and complex- . . . the agency considered the matter in a detailed and reasoned fashion and the decision involved reconciling

conflicting policies." *Chevron U.S.A. v. Natural Resource Defense Council*, cited above, at 865.

What is especially damaging in according to the Director's interpretation deference in this case was the lower court's acceptance of the unsubstantiated claim the issue in this matter has not been the source of controversy or misunderstanding and that the interpretation of the benefits review board was contrary to the longstanding actual implementation of the provision (App. 14). The Director never promulgated this interpretation, never appeared in the trial and never offered any evidence to back up its assertions. The lower court gave no consideration to the belatedness in the Director's assertions of its interpretation of the statute.

The Longshoreman cannot claim to know precisely where is the line between deference to the reasoned, previously promulgated, statutory interpretation of the Director and the duty of the courts to interpret the statute. In this case, however, the lower court's interpretation is far onto the wrong side of that line.

THE ISSUES IN THIS CASE ARE IMPORTANT

The lower court decision is the first instance in which the 33 U.S.C. 922 has been interpreted as permitting retroactive modification of awards, at the discretion of the Administrative Law Judge, in all instances. This Court has been called upon on a number of occasions to interpret the statute. The only ambiguity in 922 (whether it barred a claim not subject to a prior order) was resolved in *Intercounty Construction Corp. v. Walter*, 422

U.S. 1 (1975). All of the other cases of this court interpreting Section 922 have addressed themselves to the statutory interpretation only of the grounds under which modification may be granted under that section, *Banks v. Chicago Grain Trimmers Assoc., Inc.*, cited above; *O'Keefe v. Aerojet General Shipyards*, cited above; *Metropolitan Stevedore Co. v. Rambo*, cited above. The court below cited *Rambo* in support of its overly broad interpretation of the statute. However, those cases extended a liberal principle of interpretation to the *grounds* upon which modification (whether relative to mistake in finding of fact or change in conditions) can be granted. The liberality of interpretation of the grounds on which modification can be granted are based upon the plain reading of the statute and its legislative history.

This Court has not (nor any court until now) interpreted the very specific language of the section relative to disposition of awards when modification is granted. The court below erred in extending the same liberality accorded to the grounds on which modification can be granted to the very specific language relative to awards. This court's intervention is necessary to complete its interpretation of Section 922. In addition, the holding of the court below would create great administrative uncertainty relative to the status of award when modification is granted. The undersigned, as attorney for the Petitioner certifies, as an officer of the court, that a substantial number of such cases are pending to his knowledge. The intervention of this Court is urgently required to settle this matter.

The longshoreman is also concerned about the possibility that the Department of Labor and courts below may

have misinterpreted the impact of its holding in the case of *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). That case invalidated the "true doubt" rule and placed burden of proof on the claimant in cases under the Act and its extensions. It is submitted that it is necessary to remind the court below of a basic principle of statutory interpretation of this court: that the Longshore and Harbor Workers' Compensation Act should be liberally construed in favor of the injured worker no doubts as the statutory resolved in its favor, *U.S. Dept. of Labor v. Perini North River Construction*, 458 U.S. 279 (1984); *Voris v. Eikel*, 364 U.S. 328 (1953). Perhaps, the best evidence of an unfortunate change in a legal environment is the fact that the Director is herein arguing against the injured worker.

The issue of deference is also of crucial importance. The decision below accorded deference to the statutory interpretation of the Director, Office of Workers' Compensation Programs and that interpretation had not been incorporated in any memorandums, regulations, or in any way publicly promulgated, announced at a late state of the litigation, involving statutory division in which the Director has no administrative interest. The line between deference and the obligation of the courts to interpret the law needs to be more precisely drawn.

CONCLUSION

WHEREFORE, the Petitioner respectfully prays the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to reverse the decision of said court and reinstate the decisions of the

Benefits Review Board of February 23, 1999 and October 7, 1999.

Dated: New York, New York
December 18, 2000

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 30, 2000 Decided: September 21, 2000)

Docket No. 99-4175

UNIVERSAL MARITIME SERVICE CORPORATION,

Petitioner,

–against–

LOUIS SPITALIERI, and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

Before:

PARKER and KATZMANN, *Circuit Judges,*
and BRIEANT, *District Judge*.*

Petition by employer, supported by the Director, Office of Workers' Compensation Programs, to review a final order of the Benefits Review Board established under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50. Order reversed.

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* Hon. Charles L. Brieant, Judge United States District Court for the Southern District of New York, sitting by designation.

LAWRENCE P. POSTOL, Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., *for Petitioner.*

PHILIP J. ROONEY, Isreal, Adler, Ronca & Gucciardo, New York, N.Y., *for Respondent Spitalieri.*

ANDREW D. AUERBACH, Attorney, Office of the Solicitor, U.S. Department of Labor, Washington, D.C., Henry L. Solano, Solicitor, Carol A. De Deo, Associate Solicitor, Mark Reinhalter, Senior Attorney, *for Respondent Director of Workers' Compensation Programs.*

BRIEANT, *District Judge:*

Petitioner Universal Maritime Service Corporation (the "Employer") seeks review of a final order of the Benefits Review Board (the "Board") established under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (the "Act," or "LHWCA"), issued October 7, 1999, which terminated the temporary total disability payments of Respondent employee Louis Spitalieri ("Claimant") but declined to allow the employer a credit for overpayment against a schedule award for a partial permanent hearing loss arising out of the same injury. The Board opinion *en banc* with two Administrative Appeals Judges dissenting is reported in 33 BRBS 164, 1999 WL 1021572 (DOL Ben. Rev. Bd. Oct. 7, 1999).

The Issue Presented

Is an employer who paid a claimant Workers' Compensation benefits for a temporary total disability during a period after he recovered from his injuries and became

capable of returning to his usual employment entitled to a credit for such overpayment to be applied to a schedule award for a permanent partial binaural hearing loss of 6.9% arising out of the same accident? The Administrative Law Judge answered the question in the affirmative. The Board reversed as a matter of law, holding that "termination" of benefits is not a "decrease," and 33 U.S.C. § 922, by negative implication, prohibited a set-off. We have jurisdiction under 33 U.S.C. § 921(b)(3). We reverse.

Procedural History

On April 10, 1992, while working as a longshoreman at the Employer's facility at Red Hook in Brooklyn, New York, Claimant was injured when a U-shaped box he was in was flipped by a crane, and he was thrown to the ground. On November 15, 1993, Administrative Law Judge Robert S. Amery found that as of that date and since the accident, Claimant had a temporary total disability, which had not yet reached maximum medical improvement. Specifically, he had head, neck, back and left leg injuries, in addition to a partial hearing loss and psychiatric problems, all caused by the April 10, 1992 injury. The Administrative Law Judge awarded compensation, declining to find a permanent disability. The Employer paid the weekly award of two-thirds of the Claimant's average weekly wage at the time of the injury, as required by the Act.

Thereafter, on July 10, 1996, armed with four days of surveillance videotapes, Employer, while still paying benefits, filed a modification request based on a change of

condition, namely that Claimant had reached maximum medical improvement and was no longer disabled. A full hearing was held before Administrative Law Judge Paul H. Teitler, who issued his findings and conclusions on January 15, 1998. He found that a change of condition had been established by the employer, that Claimant had reached maximum medical improvement on August 31, 1994,[1] and was not temporarily totally disabled after that date, and was able to return to his usual employment. The Administrative Law Judge concluded that Claimant was not eligible for continuing benefits and that the Employer was entitled to a credit for benefits paid since the date of maximum medical improvement. He noted that, "By virtue of finding a change in conditions had occurred and Claimant was no longer entitled to benefits, it was not necessary to address whether a mistake in fact occurred. However, such an analysis would have yielded the same result based upon the newly submitted evidence." Joint Appendix at 67.

Administrative Law Judge Teitler ordered that the Employer was "entitled to a credit for payments made to Claimant from the date of maximum medical improvement." By a decision and order on reconsideration issued February 6, 1998, the Administrative Law Judge awarded a scheduled disability to Claimant, against that credit, not disputed by the Employer, for a permanent partial binaural hearing loss of 6.9 percent, arising out of the same April 10, 1992 accident, computed at $7,465.00, and held that, "[t]his award shall be offset by any credit that the

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[1] The Board on review changed this date to February 21, 1996. Neither side seeks to review this finding.

Employer may have accrued [as a result of overpayment for the temporary total disability]." Joint Appendix at 40.

Claimant appealed to the Benefits Review Board. By a panel decision issued February 23, 1999, reported at 33 BRBS 6, 1999 WL 1021572, at *2 (DOL Ben. Rev. Bd. Oct. 7, 1999), the Board affirmed the determination of the Administrative Law Judge that Claimant was no longer disabled, corrected the date of maximum medical improvement as noted above, and, in light of its construction and application of the relevant statute, 33 U.S.C. § 922, discussed below, held that the Administrative Law Judge had erred as a matter of law in granting the Employer a credit for the overpaid benefits against the scheduled award for the hearing loss. This decision became the subject of a Decision and Order on Reconsideration *en banc* before the entire membership of the Benefits Review Board, which issued the Decision and Order of October 7, 1999, which is before this Court for review on this appeal. By that decision, with two Administrative Appeals Judges dissenting, the Board held that "[s]ince the decision on modification terminated plaintiff's temporary total disability benefits, and did not decrease them, and as the plain language of [33 U.S.C. § 922] prohibits an order on modification from affecting compensation previously paid, the termination cannot be effective prior to the date of the decision on modification." 33 BRBS 164, 1999 WL 1021572, at *2.

Discussion

The relevant provision of the statute is as follows:

§ 922. Modification of awards

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

The powers vested in the Deputy Commissioner are now vested in the District Director. See 20 C.F.R. § 701.301(a)(7). Administrative Law Judges have been authorized to adjudicate disputes under the act.

The majority of the Board, sitting *en banc*, concluded that termination of benefits was not a "decrease" within the meaning of the section, and therefore the termination of compensation could not be made effective prior to the date of the Administrative Law Judge's order.

This appeal presents the issue of whether under 33 U.S.C. § 922 an employer who overpaid a claimant who was feigning temporary total disability is nevertheless liable to pay additional compensation for a permanent partial hearing loss resulting from the same injury. Our review is limited to errors of law. The findings of fact in this case are supported by substantial evidence; no party to this appeal claims otherwise. The petition for review presents a question of law which we review de novo. *See Voris v. Eikel*, 346 U.S. 328, 333-34 (1953); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993). When a statute is ambiguous, the administrative construction of statutory terms by the Respondent Director of the Office of Workers' Compensation Programs, if reasonable and consistent with Congressional intent, is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 & nn.9, 11 (1984); *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 1016 (2d Cir. 1993); *Director, Office of Workers' Compensation Programs v. General Dynamics Corporation ("Bergeron")*, 982 F.2d 790, 793-94 (2d Cir. 1992). The Board's construction is entitled to no special deference. *See Rasmussen*, 993 F.2d at 1016.

We conclude that the Director's construction of § 922 in this case is reasonable and consistent with the statutory structure and purpose and accordingly is entitled to the deference ordinarily afforded to the official charged

by Congress with the responsibility for administering a benefits program. *See Bergeron*, 982 F.2d 790, 793-95. We find that the Board's "insistence on what seems to us a 'narrowly technical and impractical construction,' " *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 297 (1995), of the term "decrease" is inconsistent with the purpose of the statute.

The Director's practical construction of § 922 of the statute authorizes the result reached in this case by Administrative Law Judge Teitler and supported in this Court by the Director. The statute grants to an Administrative Law Judge when reviewing a compensation order in a § 922 modification proceeding involving either a change in conditions or a mistake of fact the power to "issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation." *Id.* The words in this statutory series are intended to and do comprise all possible responses to a claim of change in conditions or mistake of fact. The statute goes on to provide that a new order issued in such a situation "shall not affect any compensation previously paid." *Id.* This statutory direction is modified by two exceptions: if the compensation rate is increased, the new order may be made "effective from the date of the injury," thus permitting a claimant to receive increased compensation for past periods of disability. *Id.* The other exception, stated in the same sentence, reads "and if any part of the compensation due or to become due is unpaid an award decreasing the compensation rate may be made effective from the date of injury and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . . " *Id.* This exception permits

offset against *unpaid* compensation, even though the statute has been construed to forbid an employer from recovering back compensation which has previously been paid. *See Lennon v. Waterfront Transport*, 20 F.3d 658, 661 (5th Cir. 1994) (employer not entitled to recoup overpaid benefits under LHWCA, and employer's right to due process not violated thereby).

In this case, the Administrative Law Judge found, as modified by the Board, that Claimant was no longer temporarily totally disabled and could return to his former employment on February 21, 1996. The Employer had paid for temporary total disability through January 20, 1998, at $540.99 per week, amounting to approximately $54,000.00 to which he was not entitled. The Administrative Law Judge also found that arising out of the same accident, Claimant was entitled to a schedule award of $7,465.00 for his permanent partial hearing loss.

We hold that the statute authorizes this latter amount to be set off against the excess payment of approximately $54,000. We agree with Petitioner and the Director that the exception for a "decrease" in the second sentence of § 922 should be read to include a decrease to zero, i.e., a termination of benefits. By the same token, we would read "increase" to include modification orders which "award" compensation. We do not believe that a "termination" of benefits is somehow different from a "reduction" of benefits, in this case, to zero. Therefore we reject as unreasonable the effort of the Board to find a negative implication in the statute to the effect that the provisions applicable to a decrease do not extend to a termination.

To hold otherwise would counter normal English usage and have no relation to the statutory purpose, which is to compensate employees an amount fixed under the statute for their injuries, and to cease payment when circumstances so require. *See Rambo*, 515 U.S. at 298 (purpose of the LHWCA is "to compensate employees . . . for wage-earning capacity lost because of injury[.] [W]here that wage-earning capacity has been . . . restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.") Where the literal application of statutory language "will produce a result demonstrably at odds with the intentions of its drafters, . . . it is the intention of the legislators, rather than the strict language, that controls." *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-14 (2d Cir. 1995). Thus, refusal to apply a credit for overpayment of an unscheduled award against a schedule award arising out of the same accident has no basis in common sense or in the statute.

We also hold that the modification of Claimant's award on the ground of a change in conditions may be made effective from the date of that change in conditions on February 21, 1996, the date when Claimant was no longer temporarily totally disabled. Although Section 922 states that a decrease in the compensation rate may be made effective "from the date of the injury," we hold that the statute grants an Administrative Law Judge the broad authority to make a modification effective from the date when an injury occurred and any date after the injury when a change in conditions occurs. By granting the ALJ the authority to modify an award on the ground of a change in conditions, the statute authorizes the ALJ to

modify an award as of a date subsequent to the initial injury. We see no reason to conclude that the award increases and decreases permitted under the exceptions must be made from the specific date of injury or not at all. Such a narrow interpretation would limit award increases and decreases that affect compensation previously paid to those based on mistakes in determinations of fact, and render the change in conditions language inapplicable to the exceptions. In the absence of any indication that this was the intention of the legislators, we do not adopt such a limiting interpretation. We conclude instead that the statutory grant of authority to the Administrative Law Judge to make modifications to compensation awards includes the authority to make modifications effective from any date after the injury where there is a change in condition. *See, e.g., Lussier v. Runyon,* 50 F.3d 1103, 1108 (1st Cir. 1995) (grant of greater power logically includes grant of lesser power); *American Hospital Assoc. v. Bowen,* 834 F.2d 1037, 1052 (D.C. Cir. 1987) (same).

Claimant appears to argue, relying on *Jarka Corp. v. Hughes,* 299 F.2d 534, 536-37 (2d Cir. 1962), that the exceptions in § 922 apply to mistakes of fact but not to changes in condition, and therefore that no retroactive modification may be made in this case based on a change in condition. This argument is without merit. The language in *Jarka* does not affect our interpretation of the statute because it is dicta and it does not address the issue we are concerned with here. *Jarka* addressed an inconsistency in a deputy commissioner's order where the deputy commissioner dated a modification to the date of injury, but

called it a modification for a change of condition. This Court stated:

> [T]he distinction within [§ 922] between change in condition and mistake of fact only makes sense if the language speaking of retroactivity to the date of the injury is limited to modifications based upon mistake of fact. . . . In any case where a Deputy Commissioner would modify a prior award retroactively to the date of injury because he evaluates the claimant's condition differently, it necessarily follows that he believes that the prior determination of condition was incorrect and based upon a mistake of fact, and he cannot be making the new order because of a change of condition.

Id. This passage does not relate to the instant case because we are concerned here with a change of condition, not a mistake of fact. The passage states the logical conclusion that an award modified to the date of the injury must depend upon a mistake of fact. Here, the award was not modified to the date of injury, but rather to a subsequent date, because it was based on a change of condition.

In *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), the Court of Appeals for the District of Columbia Circuit indicated that it was within the discretion of the ALJ to make his decision retroactive from the date of the ALJ's decision. *See id.* at 1381 ("the question [on remand] remains whether the decision should be retrospective, freeing the petitioner McCord of all liability, or prospective only from the date that such decision shall have been rendered, thus preserving entitlement in decedent's dependents to benefits up to that time"). We likewise

conclude that the ALJ had the discretion to modify the prior award and make the modification retroactive from the date of the ALJ's decision, to the date of Claimant's partial recovery. To give the modification retroactive effect, we also conclude, for the reasons stated above, that the excess payment made after Claimant's recovery from his temporary total disability may offset the award made for Claimant's permanent partial disability. *McCord*, which held that "under the terms of [§ 922], it is within the discretion of the Administrative Law Judge, subject to review by the Board, to determine whether according retroactive effect to a correcting order will "render justice under the act," demonstrates the true intention of the statute – to "render justice." 532 F.2d 1377 at 1381. To construe the statute so as to not permit a credit for retroactive termination of benefits would fail to render justice, especially where, as here, the overpayment is tinged with fraud on the part of Claimant.

Section 922 of the LHWCA was amended in 1934, when the exceptions clause was added, as well as the provision for modification "because of a mistake in determination of fact." Act of May 26, 1934, Ch. 354 § 5, 48 Stat. 806, 807. Both the House and Senate Committees reporting the legislation advised that "the amendment also permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act, such modifying award to date from the time of the accident." S.Rep. No. 73-588, at 3-4 (1934); H.R.Rep. No. 73-1244, at 4 (1934). The statute was amended again in 1938. Act of June 25, 1938, Ch. 685, § 10, 52 Stat. 1167.

This amendment permitted review of a case at any time prior to one year after the rejection of a claim, and authorized the award of compensation. Amendments of a purely formal nature were made to the Act in 1984. Section 922, however, has remained unchanged since 1938. The Director represents that it has "not been the source of controversy or misunderstanding" and that the Board's interpretation of the statute in this case is "contrary to longstanding actual implementation of the provision." Director Br. at 18; cf. *McCord*, 532 F.2d 1377.

We agree with the Director that there is nothing in the legislative history of the statute which justifies the narrow construction placed on it by the Board in this case that "decrease" under the statute does not include a termination of benefits. In *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. at 291, the Supreme Court rejected an attempt to narrow the authority afforded an ALJ by the statute. Where an ALJ has broad authority to "terminate, continue, reinstate, increase or decrease such compensation, or award compensation," 33 U.S.C. § 922, the interpretation as put forth by the Board's decision would give the statutory language "impractical construction." *Rambo*, 515 U.S. at 298. The authority of an ALJ to modify existing orders based on mistakes in fact or changes in condition under § 922 is broad. *See O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254, 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464-65 (1968); *Rambo*, 515 U.S. at 291. We conclude that the power to give credit to an employer for overpayment where there has been a termination of benefits falls under this authority.

Accordingly, the order appealed from is reversed. The award of counsel fees to Claimant is vacated.

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[SEAL]

LOUIS SPITALIERI Claimant-Petitioner v. UNIVERSAL MARITIME SERVICES Self-Insured Employer-Respondent	BRB No. 98-743 **PUBLISHED** DATE ISSUED: OCT 7 1999 DECISION and ORDER on RECONSIDERATION *EN BANC*

Appeal of the Decision and Order on Modification – Denying Benefits and the Decision and Order on Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration of the Board's decision in the captioned case, with a suggestion for reconsideration *en banc*. 33 U.S.C. § 921(b)(5); 20 C.F.R. §§ 801.301, 802.407; *see Spitalieri v. Universal Maritime Services*, 33 BRBS 6 (1999). Claimant responds, seeking affirmance of the Board's decision, and additionally has filed a petition for an attorney's fee for work performed before the Board. For the reasons that follow, we grant the motion for reconsideration *en banc* but deny the relief requested.

To recapitulate, claimant sustained work-related injuries to his neck, head, back and left knee in an accident on April 10, 1992. After a hearing on the merits, Administrative Law Judge Amery found that claimant was temporarily totally disabled due to the work injuries, and he awarded claimant benefits in November 1993. Emp. Ex. 7. On July 10, 1996, employer filed a motion for modification of Judge Amery's award pursuant to Section 22 of the Act, 33 U.S.C. § 922, on the ground that claimant's condition had changed and he was no longer disabled. Emp. Ex. 9. After modification proceedings, Administrative Law Judge Teitler (the administrative law judge) found that claimant's condition is such that he could return to his usual work and that he was no longer disabled as of August 31, 1994. Decision and Order on Modif. at 15, 17-18. Further, he found that claimant sustained a work-related hearing loss of 6.9 percent caused by the 1992 injury and and is entitled to a hearing aid at employer's expense; he did not, however, address claimant's entitlement to benefits for his hearing loss in the decision.

Claimant filed a motion for reconsideration. The administrative law Judge found that claimant is entitled to disability benefits for his 6.9 percent hearing loss, but that since Section 22 provides for a credit for an overpayment of benefits, those benefits are subsumed by employer's overpayment of temporary total disability benefits since August 31, 1994. Decision and Order on Recon. at 1-2.

Claimant appealed the administrative law judge's decisions to the Board. The Board affirmed the administrative law judge's finding that claimant is no longer disabled based on the credited medical evidence. The Board held, however, that the administrative law judge erred in terminating claimant's temporary total disability benefits retroactively. Specifically, the administrative law judge credited the February 21, 1996, opinion of Dr. Swearingen to find that claimant was no longer disabled, yet relied on the opinion of claimant's treating physician that claimant reached maximum medical improvement on August 31, 1994, to terminate benefits; however, this doctor believed claimant to be disabled at that time. The Board thus held that February 21, 1996, is the earliest date that compensation could be terminated. *Spitalieri*, 33 BRBS at 8-9.

Moreover, the Board held that since the decision on modification terminated claimant's temporary total disability benefits, and did not decrease them, and as the plain language of Section 22 prohibits an order on modification from affecting compensation previously paid, the termination cannot be effective prior to the date of the decision on modification. The Board therefore vacated the finding that employer overpaid temporary total disability

compensation and is entitled to credit this overpayment against its liability for the hearing loss benefits. The administrative law judge's decision was modified to reflect claimant's entitlement to benefits for the 6.9 percent hearing loss. *Id.*

In its motion for reconsideration, employer contends that the termination of benefits is a "decrease" in compensation within the meaning of Section 22 such that it is entitled to a credit for its overpayment of temporary total disability benefits against its liability for benefits for claimant's hearing loss. In this regard, employer contends that the cases on which the Board relied to hold to the contrary, *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992), and *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993), do not support its holding. Employer further contends that the Board failed to address its entitlement to a credit pursuant to Section 14(j) of the Act, 33 U.S.C. § 914(j).

Initially, we note that employer states that the Board held in its decision that claimant's benefits terminated as of February 21, 1996; employer employer [sic] therefore argues it is entitled to a credit against its liability for the hearing loss for the benefits paid between that date and the date the administrative law judge's decision was issued, January 18, 1998. This is an incorrect reading of the Board's decision. The Board stated that the *earliest* termination date could be February 21, 1996, based on the credited medical opinion, but that since the administrative law judge's decision terminated all temporary total disability benefits, the effective date of the termination had to be the date of the decision so that compensation

previously paid would not be affected, pursuant to the plain language of Section 22. *Spitalieri*, 33 BRBS at 8.

We therefore next address employer's contention that the termination of claimant's temporary total disability compensation is a "decrease" in compensation within the meaning of Section 22, such that the effective date of the modification order is February 21, 1996. The relevant portion of Section 22 states:

> [The administrative law judge may] issue a new compensation order which may *terminate*, continue, reinstate, increase or *decrease* such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award *decreasing* the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation . . .

33 U.S.C. § 922 (emphasis added). In the event an award of benefits is modified, Section 22 mandates that prior payments of compensation shall not be affected by the modifying order except in two circumstances – where there has been either an increase or a decrease in the compensation rate awarded. Relevant to the issue herein, Section 22 specifically allows a credit against unpaid compensation due where the compensation rate has been decreased. The statutory provision uses both the words "terminate" and "decrease" in the same sentence; thus, they must have different meanings, *see Nat'l Insulation*

Transportation Committee v. Interstate Commerce Commission, 683 F.2d 533 (D.C. Cir. 1982) (use of different terminology indicates Congressional intent to establish a different meaning), and moreover, each term must be used consistently within the same statutory provision. Based on the plain language of the statute, therefore, we reject employer's contention that the termination of benefits is a "decrease" within the meaning of Section 22 such that the order terminating compensation may be effective prior to the date of the administrative law judge's order. This interpretation would permit the modifying order to affect the temporary total disability compensation previously paid in contravention of the statutory mandate to the contrary. The views espoused by our dissenting colleagues similarly disregard the clear statutory language[1].

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[1] We do not agree with our dissenting colleagues' opinion that the decision in *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), clearly supports the position that Section 22 permits the retroactive termination of benefits. First, it is not at all clear from the decisions of the Board and the Circuit Court whether the employer had, in fact, made payments of benefits in accordance with the award entered by the deputy commissioner. Thus, it cannot be ascertained whether, in writing of potentially freeing the employer of all liability by giving retroactive effect to the modifying order, any previously paid benefits were at stake. Secondly, and more importantly, neither the court nor our colleagues on the Board at that time engaged in an analysis of the statutory language of Section 22 which expressly provides that a new order may not affect compensation previously paid, and the court did not discuss whether the term "decrease" in Section 22 encompasses termination. In fact, the *McCord* case does not address the duration of a claimant's disability award at all. Rather, the focus of the court's decision is the scope of modification based on a mistake in fact which, if proven in that case, would have

We also reject employer's contention that the cases cited in the Board's initial decision do not support this conclusion, as the differing fact patterns in those cases do not detract from the relevancy of their holdings to the case herein. In *Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT), the issue before the United States Court of Appeals for the Ninth Circuit was whether an employer had a cause of action under the Act to recoup an overpayment of benefits where no benefits are due. In concluding that it does not, the court discussed Sections 8(j), 14(j) and 22 of the Act, 33 U.S.C. §§ 908(j), 914, 922. Relevant to Section 22, the court stated that this provision limits employer's recovery of overpayments of compensation to a credit against prospective compensation, and that otherwise, the new order cannot affect any compensation previously paid. 953 F.2d at 557, 25 BRBS at 98 (CRT).

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nullified an award of death benefits *ab initio*. *See generally Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999). Employer in *McCord* sought modification in order to prove decedent was not an employee of employer, and thus, that no benefits were ever due his widow. The Board held that "jurisdictional facts," such as the existence of the employer-employee relationship, are not subject to modification, and that the use of the terms "terminate" and "decrease" in Section 22 did not authorize nullification of the award *ab initio*. The court disagreed with this analysis, holding that the authority to reopen based on a mistake of fact under Section 22 is not limited to a particular type of facts and the authority to "terminate" includes the power to nullify an award in a proper case. The court went on to hold that the power to reopen does not mean reopening is automatic; rather, modification must also render justice under the Act. Thus, the court remanded the case for a determination as to whether reopening would render justice. On remand, the Board held reopening would not do so, and upheld the award. *Cephas v. McCord* 4 BRBS 224 (1976).

In *Parks*, 26 BRBS 172, the claimant's permanent partial disability award was terminated after modification proceedings. Since the claimant's benefits were being paid by the Special Fund, the administrative law judge found the employer entitled to a credit for its assessments to the Special Fund as of the date employer filed its motion for modification. The Director appealed the credit against employer's Special Fund assessment, contending, *inter alia*, that inasmuch as the administrative law judge's decision terminated claimant's benefits, the termination can be effective only as of the date of the decision. The Board agreed, and held that "the Act does not provide for retroactive termination." 26 BRBS at 175. It went on to describe the two situations in which Section 22 permits a new order to "affect" compensation previously paid: (1) an increase in the compensation rate can be made effective from the date of injury; and (2) a decrease in the compensation rate may be credited against any compensation due. *Id*, Contrary to employer's assertion, therefore, these cases support the proposition that an order terminating compensation cannot be retroactive.

The last issue, then, is whether the fact that claimant is entitled to permanent partial disability benefits for his hearing loss arising out of the same work event means that there is unpaid compensation due such that the modification order can be effective on February 21, 1996, entitling employer to a credit against the hearing loss benefits due. In this regard, employer states that the Board's decision did not discuss Section 14(j), which provides: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out

of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j).

Under the facts presented here, we hold that employer is not entitled to a credit pursuant to either Section 22 or 14(j), as there is no overpayment in this case. Section 22 permits the offset of an overpayment against compensation due or to become due when there is a decrease in the compensation rate as a result of modification proceedings. As we have discussed, there is no decrease in the compensation due for temporary total disability in this case. Indeed, the temporary total disability award was not decreased to an award for permanent partial disability; rather, the temporary total disability benefits, based on claimant's inability to perform his usual work due to the back, head, leg and psychological injuries, were completely terminated, at which time claimant became entitled to the scheduled permanent partial disability award for his hearing loss notwithstanding his ability to return to his usual work.[2] *See generally Henry v. George Hyman Const. Co.*, 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984). Since an overpayment can only be created by a retroactive termination of benefits, which is not allowed, there is no overpayment to be credited against the permanent partial disability due for the hearing loss. Similarly, there is no Section 14(j) credit because employer made no advance payments of compensation.

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[2] We note, however, that the permanent partial disability benefits are paid at the same compensation rate as the total disability benefits, but for the number of weeks proportionate to the impairment. *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986); 33 U.S.C. § 908(c)(13), (19).

Employer paid compensation due pursuant to an order until the day it was terminated. We, therefore, reject employer's contention and affirm the Board's decision awarding claimant benefits for his hearing loss.[3]

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[3] The Board has not addressed an employer's entitlement to a credit pursuant to Section 14(j) for an overpayment of total disability benefits against its liability for scheduled permanent partial disability benefits for an injury that arose out of the same accident as that which gave rise to the total disability, but which injury was not compensated by virtue of the award of total disability benefits. *Cf. Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993) (employer not entitled to credit an overpayment for one injury against compensation due for subsequent unrelated injury). Claimant's entitlement to total disability benefits was based on his inability to work due to a contusion to the head, a sprain of the cervical spine, a sprain and contusion of the low back, a sprain of the left knee joint, as well as on psychological difficulties. *See* Emp. Ex. 7 at 4-5. There is no evidence that the hearing loss that resulted from the head injury caused an inability to work. Moreover, even though permanent partial disability benefits for the hearing loss could not be paid while claimant was temporarily totally disabled, *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956), claimant is entitled to be fully compensated for all consequences of his work accident. *See generally Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

The case cited by our dissenting colleagues, *McCabe Inspection Service, Inc. v. Willard*, 143 F.Supp. 393 (S.D. N.Y. 1956), *aff'd*, 240 F.2d 942 (2d Cir. 1957), does not compel a finding that Section 14(j) is applicable in the instant case. The claimant therein sustained temporary total disability followed by scheduled permanent partial disability to his leg. The employer paid claimant his full wages during the period of total disability; this amount was in excess of that due for total disability, and the employer sought to credit the excess wages against the amount due for scheduled permanent partial disability. The case did not involve overpayments of

Claimant's counsel has requested an attorney's fee for work performed before the Board, including time spent preparing a response to employer's motion for reconsideration. Counsel requests a fee for 8.75 hours. With regard to his hourly rate, he states that his customary billing rate is $300 per hour, but that he is requesting an hourly rate of $150 in this case. Thus, the fee requested is $1,312.50. Employer responds that claimant's fee request is excessive given that he unsuccessfully appealed the administrative law judge's finding that he was no longer disabled. Employer therefore argues that the fee awarded should be no more than half of that requested.

It is true that claimant was only partially successful in his appeal to the Board, in that the board affirmed the administrative law judge's finding that claimant's condition had changed such that he was no longer disabled and could return to work. We have, however, affirmed

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compensation, but rather an employer who sought to credit wages paid during disability against subsequent compensation due. The courts held employer entitled to such a credit for wages paid in excess of compensation due. Significantly, the case did not involve a credit created by the retroactive termination of compensation pursuant to Section 22, nor is it clear that the temporary total disability and permanent partial disability benefits arose out of injuries to different body parts. Indeed, from our reading of these decisions, it appears just as likely that the claimant was temporarily totally disabled by his leg injury, after which he became entitled to scheduled permanent partial disability for that same injury. Under the latter scenario, we agree that an employer would be entitled to credit excess temporary total disability payments against its liability for scheduled permanent partial disability.

the Board's decision which modified the administrative law judge's decision to award claimant permanent partial disability benefits for his hearing loss. The hearing loss award amounts to over $7,400.[4] The fee requested thus is commensurate with the amount of benefits gained, and we therefore award counsel the full fee requested. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992); 33 U.S.C. § 928; 20 C.F.R. § 802.203.

Accordingly, employer's motion for reconsideration *en banc* is granted, but the relief requested is denied. Claimant's counsel is awarded an attorney's fee of $1,312.50 for work performed before the Board, to be paid directly to counsel by employer.

SO ORDERED.

/s/ Betty Jean Hall
BETTY J HALL, Chief
Administrative Appeals Judge

We concur:

/s/ [Illegible]
ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[4] The parties stipulated that claimant's average weekly wage was $811.56. Based on the 6.9 percent hearing loss, claimant is entitled to benefits of $541.04 (two-thirds of $811.56) for 13.8 weeks, which totals $7,466.35.

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination that Section 22 of Longshore and Harbor Workers' Compensation Act does not authorize an administrative law judge on modification to retroactively terminate an award of benefits[5] and therefore that employer is not entitled to a credit for overpayment of benefits. The only legal authority is to the contrary. In *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit expressly held that on modification an administrative law judge has the authority to terminate benefits retroactively.

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[5] Section 22 provides in pertinent part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the secretary. . . .

In its initial decision in the instant case, the Board held that substantial evidence supports the administrative law judge's Decision and Order on Modification – Denying Benefits, issued on January 15, 1998. The administrative law judge had determined that employer had established that claimant was no longer temporarily, totally disabled and found that this was a change in conditions warranting modification of the prior award by terminating benefits. *Spitalieri v. Universal Maritime Services*, 33 BRBS 6 (1999). The Board held that the administrative law judge had erred, however, in terminating benefits effective August 31, 1994, the date of maximum medical improvement, and that February 21, 1996 was the earliest date which could be used because that is the date on which the first medical opinion, Dr. Swearingren's, found claimant was not disabled. *Id.* at 8. The Board declared that, notwithstanding a determination of the earliest date on which claimant was fully capable of returning to work, termination of benefits could not be effective prior to the date on which the administrative law judge issued his decision. The Board reasoned that because Section 22 authorizes an administrative law judge, *inter alia*, to terminate as well as to decrease benefits, and expressly provides for retroactive effect to be given to an order which "decreases" benefits, retroactive effect could not be given to an order terminating benefits. The Board held that "termination" of benefits is not a "decrease" in benefits within the meaning of Section 22. The Board determined that since the order terminating benefits could not be retroactive, employer's payments of more than $50,000, after claimant ceased to be disabled

on February 21, 1996, until the date on which administrative law judge's decision was issued, January 15, 1998, were not payments in excess of the amount owed, hence, employer is obliged to pay claimant an additional $7,465.66, the compensation owed pursuant to Section 8(c)(13) for his 6.9 percent binaural hearing loss. The Board vacated the administrative law judge's decision crediting employer for benefits paid since August 31, 1994 and awarded claimant an attorney fee.

On its face, the Board's decision appears unjust. An analysis of *McCord v. Cephas* reveals that it is also legally incorrect. In *McCord* the administrative law judge had granted employer's request on modification to terminate all benefits retroactively, based on evidence that decedent had never worked for employer. The decedent's widow appealed to the Board which held that Section 22 does not authorize an administrative law judge on modification to nullify an award. *Cephas v. McCord*, 1 BRBS 81 (1974). The *Cephas* Board's rationale was similar to the majority's in the instant case. The *Cephas* Board considered, *inter alia*, the words of Section 22 and determined that nullification was not authorized; it further held that "decrease," as it is used in Section 22, cannot encompass nullification. *Id.* at 83.

The United States Court of Appeals for the District of Columbia Circuit rejected the *Cephas* Board's determination that Section 22 does not authorize nullification of an award, after considering the issue in light of the Supreme Court's teaching on Section 22. The circuit court quoted extensively from *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) in which the High Court stated, *inter alia*, that the Longshore Act "was amended in 1934

expressly to 'broaden the grounds on which a deputy commissioner can modify an award . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act.' S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244, 73d Cong. 2d Sess., 4 (1934)." *McCord*, 532 F.2d at 1379-1380, 3 BRBS at 375. The District of Columbia Circuit also cited *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1967), in which the Supreme Court rejected a narrow construction of Section 22. *Id.*, 532 F.2d at 1380, 3 BRBS 375-376. The circuit court declared:

> Although *Banks* and *O'Keeffe* dealt only with reopening under § 22 for the benefit of claimants, there is nothing in the Court's language or the legislative history to suggest that the ambit of § 22 is narrower for employers seeking to 'decrease' or 'terminate' a prior award."

Id., 532 F.2d at 1380, 3 BRBS at 376. The court plainly held that "decrease" encompassed "terminate" in Section 22. Therefore, the court held that the administrative law judge had authority both to terminate the award retroactively *ab initio*, thereby relieving employer of all liability as well as the authority to terminate the award prospectively, from the date of decision, thereby preserving until that time the entitlement to benefits awarded to decedent's dependents. *Id.*, 532 F.2d at 1381, 3 BRBS at 376. The court concluded:

> Under the terms of § 22, it is within the discretion of the Administrative Law Judge, subject to review by the Board, to determine whether

> according retroactive effect to a correcting order will "render justice under the act."

Id. 532 F.2d at 1381, 3 BRBS at 378.[6]

Essentially, the court held that Section 22 authorizes modification of prior decisions in order to render justice, and that because termination of benefits is obviously a form of decrease in benefits, an order terminating benefits can be made retroactive when to do so would render justice under the Act. In holding that "decrease" in Section 22 encompasses "terminate" and therefore an order

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[6] The majority attempts to distinguish *McCord* by stating, *inter alia*, that it is unclear whether employer had made payments in accordance with the award, hence whether any previously paid benefits were at stake if the administrative law judge's decision were retroactively effective. This is a red herring. The court's holding is that an order on modification terminating benefits can be retroactive when it is in the interest of justice to make it so. The administrative law judge in *McCord* had given retroactive effect to his order. Although the court affirmed his authority to do so, the court remanded the case for the Board to determine whether reopening the record would be in the interest of justice and if the Board determined that it was, for the administrative law judge to determine whether this relief would "render justice under the act." *McCord*, 532 F.2d at 1381, 3 BRBS at 378. The court's opinion makes clear that the court was reluctant to see the employer in that case relieved of all liability:

> It would be difficult to describe a history of greater recalcitrance, of greater callousness towards the processes of justice, and of greater self-serving ignorance, than the attitude displayed by McCord in the four-plus years from the time of Cephas' death on January 1, 1969, to January 31, 1973, when McCord, after receiving notice of the Deputy Commissioner's adverse award, first began to assert his defenses.

Id., 532 U.S. at 1381, 3 BRBS at 377.

terminating benefits could be given retroactive effect, the court was implicitly applying a fundamental principle of statutory construction:

> departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the Act in question.

Sutherland, *Statutory Construction*, § 45.12 at 61 (5th ed.). *See State of Alaska v. Babbitt*, 38 F.3d 1068, 1077 (9th Cir. 1994). The majority's construction of Section 22 is both unreasonable and unjust in that it would provide a credit to an employer whose liability was decreased to $1 but not to an employer whose liability is decreased to zero. It makes absolutely no sense to deny an employer credit for benefits paid during a period when claimant is not entitled to any payment, while providing credit to an employer whose payments exceed the amount owed by as little as $1 or even $.01. Yet that is the majority's holding in the case at bar.

That the majority's holding is both unreasonable and unjust is best demonstrated by applying it to the facts of the case at bar. According to the majority, claimant's entitlement to temporary total disability cannot be terminated until the date on which the administrative law judge issued his decision, January 15, 1998, even though the evidence proves that claimant was dissembling his disability as of February 21, 1996.[7] For a period when

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[7] The evidence indicates claimant's malingering began much earlier. The administrative law judge credited the opinion of Dr. Lerman who examined claimant on April 12, 1994. He

claimant was fully capable of working, between February 21, 1996 and January 18, 1998, employer paid claimant more than $50,000 for temporary total disability. *See* Employer's Motion for Reconsideration and Suggestion for Reconsideration *En Banc* at 1. Because the majority holds that termination of benefits cannot be retroactive, it holds that employer cannot receive a credit for the $50,000 paid, hence employer must pay claimant an additional $7,465.66 for his schedule, binaural hearing impairment. It is noteworthy that the majority does not even attempt to justify its decision in terms of reason or justice. The majority insists upon a linguistic analysis of the parts of Section 22 while ignoring the whole. Thus, the majority's statutory interpretation conflicts with the result obtained by application of a well-established rule based on reason and justice. *See McCord v. Cephas, supra.*

Furthermore, by denying credit to an employer which has paid benefits for a period where none are owed, the majority would undermine one of the purposes of Section 22, which is to provide credit to employers which have overpaid benefits. The First Circuit has explained the broad application of the credit provided

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found no evidence of disability and opined that claimant was "normal in all respects" and should have returned to work months earlier. EX 24. Decision and Order at 16, 18. A woman with whom claimant had had "a relationship" between 1990 and 1994 stated that while he claimed to be disabled, claimant performed "all types of physical activities" and "worked at various auto body shops, off the books. . . . " Decision and Order at 19.

employers in what is now the next to the last sentence of Section 22.[8]

> In other words the insurer in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award, future awards, or any prior unpaid award. . . .

Bethlehem Shipbuilding Corp. v. Cardillo, 102 F.2d 299, 302 (1st Cir. 1939), *cert. denied*, 307 U.S. 645 (1939). *See also Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992). Since the administrative law judge in the instant case was entirely correct in terminating benefits retroactively, *McCord v. Cephas, supra*, he was also correct in crediting employer with payments made during the period when claimant was no longer disabled.

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[8] That sentence provides in pertinent part:

> Such new order shall not affect any compensation previously paid, except that an award . . . decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

The majority holds that employer cannot receive a credit under either Section 22 or Section 14(j)[9] for compensation paid when claimant was feigning disability, prior to issuance of the administrative law judge's decision, because termination cannot be given retroactive effect. Thus, the majority asserts, employer's payments were not "in excess" of the compensation owed under Section 22, nor were they "advance payments of compensation" under Section 14(j). As I have discussed, *supra*, the majority's holding that an order of termination cannot be retroactive is contrary to law, reason and legislative intent. The majority goes on to suggest that even if termination of benefits could be made retroactive, overpayment of benefits for temporary total disability should not provide a credit for a schedule, permanent partial disability award for an injury that arose out of the same accident as that which gave rise to the total disability. Again, the only authority is to the contrary. *McCabe Inspection Service, Inc. v. Willard*, 143 F.Supp. 393, 398 (S.D. N.Y. 1956), *aff'd*, 240 F.2d 942 (2d Cir. 1957). The Second Circuit affirmed the district court's express finding that advance payments of compensation for temporary total disability constituted advance payments of compensation for a schedule award within the meaning of Section 14(k), which is identical to the current Section 14(j). 143 F.Supp. at 398. The Second Circuit went on to state that employer

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[9] Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j).

properly received a credit, even though at the time it made the temporary total disability payments it was unaware of the schedule injury. 240 F.2d at 943.[10]

In arguing that excess payments for disability compensation cannot provide a credit against payment for a schedule award, the majority ignores the plain words of Section 22, providing that any excess payment "shall be deducted from *any* unpaid compensation . . . . " (emphasis added). As the First Circuit explained, employer is provided a credit against "a present award, future awards, or any prior unpaid award. . . . " *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 F.2d at 300. The majority cites no legal authority for its restrictive view of the credit provisions of Section 22.

The majority suggests that excess payments for total disability should not provide a credit for compensation due for a schedule award because a schedule award, unlike a total disability award, does not relate to claimant's ability to work and because "claimant is entitled to be fully compensated for all consequences of his work accident" (citation omitted) Decision and Order at 6, n. 3.

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[10] The majority attempts to distinguish the case at bar from *McCabe Inspection Service* by erroneously asserting that the latter "did not involve overpayments of compensation. . . . " Decision and Order on Recon. *En Banc* at 6, n. 3. Judge Medina, writing for the court, expressly rejected the deputy commissioner's determination that employer's payments were not compensation, which had been based on employer's failure to label them as such. 240 F.2d at 943. Obviously, unless employer's payment had been held to be compensation, employer could not have received a credit for it under the Act against unpaid compensation due.

Section 8 of the Longshore Act demonstrates the falsity of the majority's contention that a schedule award does not relate to disability. Section 8 provides for "compensation for disability" Paragraphs (a) and (b) relate to "permanent total disability" and "temporary total disability" respectively, and paragraph (c) concerns "permanent partial disability," *i.e.*, schedule awards. Professor Larson explains that both schedule awards and total disability awards are compensation for loss of earning capacity: "the only difference is that in the case of a schedule award the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience." 1C L. Larson, *The Law of Workmen's Compensation* § 58.11 at 10-492.91-10.492.92 (1996).

Section 22 provides that when it is determined that employer has paid excess compensation due to a retroactive order decreasing compensation the excess "shall be deducted from any unpaid compensation." 33 U.S.C. § 922. The district court's explanation for crediting under Section 14(k), current Section 14(j), compensation owed for a schedule award against excess compensation paid for total disability is equally applicable to the case at bar:

> If an employer is entitled to reimbursement for advance payments of one type of benefits, he is entitled to reimbursement for both, since both are compensation.

McCabe Inspection Service v. Willard 143 F.Supp. at 397. For that reason the administrative law judge was correct in ordering that employer's excess temporary total disability payments be deducted from the unpaid compensation due for permanent partial disability.

Although I agree with the majority that "claimant is entitled to be fully compensated for all consequences of his work accident," that does not mean that employer in the instant case, should pay claimant an additional $7,465.66, when employer has already paid claimant over $50,000 for a period when he was fully capable of working.

The court's construction of Section 14(k) in *McCabe Inspection Service* demonstrates how the Longshore Act should be construed to vindicate Congress's intent to provide employers with a credit for excess payments against unpaid compensation. It is the credit provision of Section 22, however, which applies to the instant case because the administrative law judge terminated benefits retroactively on modification. In enacting Section 22, Congress contemplated that an order on modification could retroactively decrease benefits, in which case excess payments "shall be deducted from any unpaid compensation." *See Bethlehem Shipbuilding Corp. v. Cardillo, supra.* Reference to the district and circuit court decisions in *McCabe Inspection Service* underscores the importance of construing the Act consistently with its purpose in providing employers with a credit against any unpaid compensation due; these cases also demonstrate the fallacy of the majority's view that excess total disability compensation cannot be deducted from unpaid compensation due for permanent partial disability.

In sum, the only legal authority on the issue expressly rejects the majority's holding in the instant case that an order on modification cannot retroactively terminate benefits. In *McCord v. Cephas,* the court overturned the *Cephas* Board's decision which offered a linguistic

analysis of Section 22 similar to that advanced by the majority here. After considering the Supreme Court's teaching on Section 22, its remedial purpose to correct prior decisions and render justice under the Act to employers as well as to claimants, the court specifically held that an administrative law judge has authority on modification to give retroactive effect to an order terminating benefits. 532 F.2d at 1381, 3 BRBS at 378.

The court's holding is further supported by reference to the principle of statutory construction authorizing the use of common sense to avoid an absurd and unjust result. According to the majority's holding, employer receives no credit for over $50,000 it paid claimant when he was malingering but able to work, prior to issuance of the administrative law judge's decision. Since employer receives no credit, under the majority's holding, employer must pay an additional $7,465.66 to a claimant who already received over $50,000 for total disability when he was not at all disabled. The result of the Board's holding is clearly unreasonable and unjust as well as contrary to the purposes of the Act in correcting prior orders, avoiding windfalls to claimants and providing credit to employers who have overpaid benefits. As I have demonstrated, the Board's indication that employer's excess payments for a disability award cannot be credited against unpaid compensation for a schedule award is similarly unreasonable, and unjust, contrary to the purposes of the Act and legal authority. *See McCabe Inspection Service, Inc. v. Willard, supra.*

Hence, I would affirm the administrative law judge's order terminating benefits, but modify the effective date to February 21, 1996. I would hold that employer is

entitled to receive a credit for benefits paid from that date forward against its liability for claimant's schedule hearing loss. Finally, I would deny in *toto* claimant's request for an attorney fee. 33 U.S.C. § 928(b).

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 98-743

LOUIS SPITALIERI Claimant-Petitioner v. UNIVERSAL MARITIME SERVICES Self-Insured Employer-Respondent	)	**PUBLISHED** DATE ISSUED: FEB 23 1999 DECISION and ORDER

Appeal of the Decision and Order on Modification – Denying Benefits and the Decision and Order on Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification – Denying Benefits and the Decision and Order

on Reconsideration (93-LHC-710) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained work-related injuries to his neck, head, back and left knee in an accident on April 10, 1992. After a hearing on the merits, Administrative Law Judge Avery found that claimant was temporarily totally disabled due to the work injuries, and he awarded claimant benefits in November 1993. Emp. Ex. 7. On July 10, 1996, employer filed a motion for modification of Judge Avery's award pursuant to Section 22 of the Act, 33 U.S.C. § 922, on the grounds that claimant's condition had changed and that he was no longer disabled. Emp. Ex. 9. After the modification proceedings, Administrative Law Judge Teitler found that claimant's condition had changed so that he was no longer temporarily disabled based on Dr. Musacchio's determination that claimant is permanently totally disabled and his condition reached maximum medical improvement on August 31, 1994. Decision and Order on Modif. at 15. Nevertheless, after placing the burden on claimant to establish his inability to return to his usual work, the administrative law judge relied on the lack of objective evidence of disability to find that claimant was no longer disabled and could return to his usual work. Consequently, he terminated

claimant's entitlement to continuing benefits as of August 31, 1994.[11] *Id.* at 17-18. Further, he found that claimant sustained a work-related hearing loss of 6.9 percent caused by the 1992 injury and is entitled to a hearing aid at employer's expense; he did not, however, address claimant's entitlement to these benefits in his order.

Claimant filed a motion for reconsideration. The administrative law judge found that Section 22 provides for a credit for an overpayment of benefits, that claimant is entitled to disability benefits in the amount of $7,465.66 for his 6.9 percent hearing loss, but that those benefits are subsumed by employer's overpayment of temporary, total disability benefits since August 31, 1994. Decision and Order on Recon. at 1-2. Claimant appeals these decisions, and employer responds, urging affirmance.

Claimant contends there has been no change in his condition and that the administrative law judge erred in so finding; therefore, he argues that employer's motion for modification should have been denied. In the alternative, claimant asserts that, if there has been a change in condition and he is no longer disabled, then the administrative law judge erred in granting employer a credit retroactive to the date of maximum medical improvement, thereby denying claimant the additional benefits for his hearing loss.

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[11] Because he found there was a change of claimant's condition, he stated he need not address the issue of mistake in fact, but he noted that had he addressed such issue, he would have reached the same conclusion. Decision and Order on Modif. at 18 n.3.

Section 22 of the Act permits the modification of a final award if the proponent of the modification can establish either a change in a claimant's condition or a mistake in a determination of fact. In the event an award of benefits is modified, Section 22 mandates that prior payments of compensation shall not be affected by the modification except in two circumstances – where there has been either an increase or a decrease in the compensation rate awarded. 33 U.S.C. § 922; *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S., 1230 (1992); *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). If a change in condition is asserted as the reason for the modification, the party making such assertion has the burden of establishing the change. However, the standard for determining disability is the same in a modification proceeding as it is in an initial hearing. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). In a case involving a mistake of fact, the administrative law judge has broad discretion to correct the mistake, demonstrated by new or cumulative evidence, or merely upon further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In this case, the administrative law judge considered the opinions of four doctors in assessing whether claimant remained disabled. Dr. Musacchio, claimant's treating physician, stated that claimant's condition had not changed and had reached maximum medical improvement on August 31, 1994, and that claimant is now permanently totally disabled. Cl. Ex. 1; Emp. Exs. 47, 55 at 107. Dr. Conciatori, claimant's treating psychiatrist opined that claimant is totally disabled due to chronic-

type major depression related to his 1992 injury. Emp. Ex. 56 at 56-57. These opinions are refuted by the opinions of Drs. Swearingren and Head. On February 21, 1996, Dr. Swearingren, a Board-certified orthopedic surgeon concluded there is no objective evidence of physical disability and that claimant can return to his usual work. Emp. Exs. 29, 31. On April 30, 1996, Dr. Head, a Board-certified psychiatrist and neurologist, stated that claimant has no psychiatric condition related to his work injury and there is no reason why he cannot return to work. Emp. Exs. 28, 37, 65 at 15, 23, 35-38. After considering the evidence, the administrative law judge credited the opinions of Drs. Head and Swearingren to conclude that claimant is no longer disabled and can return to his usual work, as is within his discretion. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see generally Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998) (administrative law judge must consider new evidence); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988) (administrative law judge must consider all evidence).

Based on the evidence of record, we reject claimant's contention that employer has not established a change of condition. Although we agree that the administrative law judge erred in using the date of maximum medical improvement established by Dr. Musacchio to establish the date claimant was no longer disabled, such error is harmless as the record contains substantial evidence to support the determination that there has, indeed, been a change in claimant's condition. Specifically, the administrative law judge should have used the date on which Dr. Swearingren-found there was no disability to establish the date of a change in claimant's condition, as the

administrative law judge credited his opinion rather than Dr. Musacchio's conclusion that claimant remained disabled. Nonetheless, we affirm the administrative law judge's determination that claimant is no longer disabled, as that finding is supported by substantial evidence. *See Parks*, 26 BRBS at 172; *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

We agree with claimant's alternate argument, however, that the administrative law judge erred in granting employer a credit for benefits due for his hearing loss against those allegedly overpaid for his back injury. Section 22, in pertinent part, specifically states:

> [The administrative law judge may] issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation . . . .

33 U.S.C. § 922. In this case, the administrative law judge improperly granted employer a credit retroactive to the date the administrative law judge determined that maximum medical improvement occurred. Thus, he found that employer overpaid benefits between August 31, 1994, and the date of his decision on modification, January 15, 1998.

As a result, he effectively denied claimant's entitlement to disability benefits for his work-related hearing loss, stating that such benefits are to be credited against those overpaid since August 31, 1994.

Initially, the first opinion to state that claimant was not disabled is that of Dr. Swearingren on February 21, 1996, and this date is thus the earliest date which could be used. Moreover, Section 22 allows a credit against unpaid compensation where the compensation rate has been decreased; otherwise, it provides that the order on modification shall not affect the compensation previously paid. In this case, there has been no decrease in claimant's compensation rate, but rather claimant's continuing disability benefits for his back injury have been terminated altogether. Thus, the exception permitting a retroactive decrease which may be reflected in a credit under Section 22 does not apply, and the termination of compensation cannot be effective prior to the date of the decision. *Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT); *Parks*, 26 BRBS at 172. Therefore, we vacate the administrative law judge's determination that employer overpaid compensation and is entitled to a credit for benefits paid for total disability for claimant's back injury against its liability for benefits under the schedule for claimant's hearing loss. We hold that claimant is entitled to temporary total disability benefits until the date they were terminated by the administrative law judge in his decision on modification. Additionally, as the administrative law judge found that claimant has a work-related hearing loss, claimant is entitled to compensation pursuant to Section 8(c)(13) of the Act, 33 U.S.C. § 908(c)(13), for his 6.9 percent hearing loss.

Accordingly, the administrative law judge's decisions are modified to reflect claimant's entitlement to disability benefits for his hearing loss consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

U.S. Department of Labor [SEAL]
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

In the Matter of: **LOUIS SPITALIERI** Claimant, v. **UNIVERSAL MARITIME SERVICES** Employer.	Case No. 93-LHC-0710 OWCP No. 02-108027

DECISION AND ORDER ON RECONSIDERATION

A Decision and Order on Modification - Denying Benefits was issued on January 15, 1988. On January 27, 1998, Claimant filed a motion for reconsideration, specifically alleging that there were three issues decided incorrectly. Employer objected to the motion on January 28, 1998.

The first issue raised on reconsideration is that Employer is not entitled to a credit for overpayment in a modification case. Claimant cites Section 22 of the Act as support for this argument. Employer asserts that Section 22 specifically allows a credit to be taken against overpayment. Section 22 provides:

> Such new order shall not affect any compensation previously paid, except that such an

> award increasing the compensation rate may be made effective from the date of injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with approval of the Secretary.

33 U.S.C. § 922. A modification order decreasing compensation may not affect any compensation previously paid, although an employer is entitled to credit any excess payments already made against any compensation as yet not unpaid. *See* § 14(j), *see generally Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992). Accordingly, in this case, Employer is entitled to a credit against any future compensation due Claimant for the overpayment, which began on August 31, 1994, the date of maximum medical improvement.

The second issue raised on reconsideration is that Claimant was found to have a 6.9% hearing loss but was not awarded a scheduled disability. Employer does not dispute this. I find that this issue has merit as Claimant should have been awarded an award for his hearing loss. Section 8(c)(13)(B) of the Act provides that compensation for permanent 100 percent loss of hearing in both ears is the equivalent of two hundred weeks of 66 2/3 of the average weekly wage. As Claimant's binaural hearing loss is 6.9 percent, his compensation is 13.8 weeks (6.9% x 200 weeks) at $540.99 (66 2/3 x average weekly wage of

$811.56) for a total of $7,465.66. This award shall be offset by any credit that the Employer may have accrued.

The final issue raised on reconsideration is that attorney's fees and expenditures should have been awarded as Claimant prevailed on the issue of hearing loss and the original order directed Employer to pay for a hearing aid. Employer asserts that the only issue before the Court was the modification request by Employer and Claimant made no claim for hearing loss or a hearing aid and therefore, an attorney's fee cannot be awarded. Additionally, Employer asserts that it timely paid for these items, via credit, therefore the timely payment of a claim cannot be the basis for a fee award. Under Section 28(a), an Employer is liable only for fees incurred after thirty days from the date the employer received notice of the claim or from the date the employer declined to pay benefits, whichever occurred sooner. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990); *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986). In this case, the hearing loss issue was not raised in Claimant's brief and in Claimant's motion for reconsideration, counsel stated "[i]t is recognized that this was not claimed at the time of the formal hearing on this case because the claimant's allegation was of an ongoing disability, which would have rendered scheduled irrelevant." Therefore, Claimant's counsel is not entitled to fees for the litigation of whether Claimant suffered a hearing loss, as this was not contested once raised and was timely paid via the credit.

As far as the hearing aid issue, Claimant did request authorization for a hearing aid on several occasions. (CX 1). The original order in this case directed Employer to

pay for Claimant's medical expenses but did not specifically state a hearing aid. (EX 7). As Claimant did request authorization which was refused, Claimant's attorney's are entitled to attorney's fees, on this issue. (EX 26); *see Ahmed v. Washington Metro Area Transit Authority*, 27 BRBS 24 (1993); *Maguire v. Todd Pac. Shipyards Corp.*, 25 BRBS 229 (1992).

No award of an attorney's fee for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby allowed to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. § 702.132 and § 702.133 of the regulations. A service sheet showing that service has been made to all parties, including Claimant, must accompany the application. Parties have thirty (30) days following the receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application. Claimant's counsel should bear in mind that any fee awarded shall take into account the amount of benefits awarded. 20 C.F.R. § 702.132(a); *Stowars v. Bethlehem Steel Corp.*, 19 BRBS 134 (1986).

ORDER

Based upon the foregoing, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Employer is entitled to a credit for payments made to Claimant from the date of maximum

medical improvement, August 31, 1994 to the final payment.

2. Claimant is entitled to $7,465.66 for a 6.9% hearing loss.

3. Claimant's counsel is entitled to attorney's fees.

/s/ Paul H. Teitler
PAUL H. TEITLER
Administrative Law Judge

Feb 6, 1998
Camden, NJ
PHT/cls

U.S. Department of Labor [SEAL]
Office of Administrative Law Judges
2600 Mt. Fohraim Avenue
Camden, New Jersey 08104

In the Matter of:	
LOUIS SPITALIERI Claimant,	Case No. 93-LHC-0710
v.	
UNIVERSAL MARITIME SERVICES Employer.	OWCP No. 02-108027

Appearances:

Phillip Rooney, Esquire
For Claimant

Lawrence Postal, Esquire
For Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER ON MODIFICATION – DENYING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. § 901 et seq.), herein referred to as the "Act". The hearing in this matter was held on June 9, 1997 in New York, New York at which time all

parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for Transcript, CX for Claimant's exhibits and EX for Employer's exhibits. This decision is rendered after having given full consideration to the entire record.

At the hearing, Claimant's exhibits 1-7 and Employer's exhibits 1-56 were admitted into evidence. The record was held open for sixty days for they submission of additional evidence. Employer submitted additional exhibits labeled EX 57-67. Claimant submitted the deposition testimony of Dr. Mussachio which is admitted as CX 8. No objection having been received, these exhibits are admitted. Both parties submitted closing briefs. Both parties also requested a ruling upon the issue of Dr. Conciatori's fee for his deposition testimony post-hearing.

ISSUES

1. Whether there has been a change in Claimant's condition or whether there was a mistake of fact in the prior decision; and

2. What fee Dr. Conciatori is entitled to for his deposition testimony.

STIPULATIONS

The parties stipulate and I find that:

1. The parties are subject to the Act.

2. The date of Claimant's injury was April 10, 1992.

3. An employer/employee relationship existed between Claimant and Universal Maritime Services at the time of Claimant's injury.

4. Claimant's injury occurred in the course and scope of his employment with Universal Maritime Services.

5. Claimant timely notified Universal Maritime Services of his injury.

6. Claimant's average weekly wage at the time of the injury was $811.56.

PROCEDURAL HISTORY

Claimant was found to have a temporary total disability by Administrative Law Judge Robert S. Avery on November 15, 1993. Judge Avery found that there was no evidence that Claimant's condition had reached maximum medical improvement and therefore, Claimant did not have a permanent disability. (EX 8). He directed that further testing and evaluations should be conducted as requested by Claimant's treating physician, Dr. Mussachio. Judge Avery found that Claimant had head, neck, back, and left leg, injuries in addition to a hearing loss and psychiatric problems. He stated that all of these problems were causally related to Claimant's April 10, 1992 injury. Section 8(f) relief was denied as Claimant did not have a permanent disability. On July 10, 1996, Employer filed a modification request based upon a change in condition. (EX 9).

SUMMARY OF THE EVIDENCE

Claimant's Testimony

A deposition of Claimant was taken on May 27, 1997. (EX 53). Claimant testified that currently he stays with both his parents and with his girlfriend, alternating between the two residences. *Id.* at 9-11. He worked on the waterfront for thirteen years before he was injured. *Id.* at 111. He testified that he was injured when a U-shaped box that he was in was flipped over. *Id.* at 18. He was wearing a hard hat but banged his head and hurt his neck, left shoulder, knee, and lower back, He was then taken by ambulance to the hospital. *Id.* at 18-19. He was discharged that same day at his own insistence and saw his family physician, Dr. Tito Musacchio, two days after the accident. *Id.* at 19-21. Currently, his back, lower back, and left knee bother him and he is very nervous and gets ringing in his ears. *Id.* at 34. He also has memory loss. *Id.* at 119. Claimant testified that he has difficulty sleeping at night due to his back pain and the ringing in his ears. *Id.* at 47-48. He visits friends of his at a repair shop during the day and stops and has coffee with them. He stated that he could pick up light objects and can walk for quite a distance, depending upon the weather. He wears a brace on his back and knee which makes him more comfortable. *Id.* at at 58-65. He drives his car almost every day. He has driven to Atlantic City several times in the past year and also has been to several Yankee's games last year. *Id.* at 43-44. In addition to seeing Dr. Musacchio, he also sees Dr. Conciatori who is a psychiatrist. He currently takes Vicodin for pain and Valium. *Id.* at 80.

Claimant testified that he had previously been involved in several car accidents, with the most recent being on May 5, 1997. *Id.* at 22-27. He also had a prior injury in 1988 when he got hurt at Universal Maritime's Redhock terminal. *Id.* at 27-28. He also had a work-related injury at Moore McCormak Lines when he fell down a hold but he could not remember the year it happened. *Id.* at 31. He does favors for One Stop Repair, picking up parts and bringing them back or going, for coffee. *Id.* at 94. He visits there once a week. He also did favors for Coney Towing such as getting coffee or pie. *Id.* at 100-101. Claimant stated that he has a Class C driver's license which he referred to as a chauffeur's license. It costs him more to keep this license each year than a standard license. *Id.*. at 103.

At the hearing, Claimant testified that he currently lives with both his father and his fiance. (TR 33). He has three children. *Id.* He has a high school education and completed three months of college as well as two months of electronics school. (TR 73). Claimant testified that he began working on the waterfront in 1979 and worked for thirteen years as a longshoreman before his accident. (TR 74). The accident occurred when he was working with a partner in a basket when it was tipped by a hi-lo. (TR 81-83). He injured the back of his head, his lower back, his neck and his left knee. (TR 84). He did not lose consciousness. (TR 105-106). He also had ringing in the ears that began after he hit his head. (TR 85). He went to the hospital the day of the accident and then went to see his own doctor. (TR 84). He began to develop psychiatric problems a couple of months after the accident. (TR 87). He also has problems with his memory. (TR 90). Claimant

testified that his marital problems began in 1991 and his divorce became final in 1994 but he was handling these problems. (TR 92).

He currently receives $541 a week in worker's compensation and an additional $530 a month from social security. An additional $750 a month in child support is garnished from his social security earnings and his life insurance premium is also paid for him due to his disability. (TR 33-34). Claimant testified that he walks and drives and can lift light bags. (TR 37). He does exercises for his back. (TR 37-38). He drives to Atlantic City to gamble and see shows when he feels good and also sees Yankee and Met games. (TR 50-51). He occasionally does errands for One-Stop-Repair such as picking up parts and getting lunch. (TR 52-53). He also does favors for Coney Towing, which is owned by a relative of his brother's wife. (TR 54-56). He does work on his own car there.

Claimant's Treating Physicians

Dr. Tito Musacchio, Claimant's treating physician, submitted a letter dated June 16, 1995. (EX 47). He stated that he had been treating Claimant since April 10, 1992 for injuries sustained when a box Claimant was riding in tipped. Dr. Musacchio diagnosed a brain concussion with post concussion syndrome consisting of headaches, dizziness as well as a bilateral hearing loss. He stated that Claimant also had injured his cervical spine, low back, and left knee joint. Dr. Musacchio found that Claimant's condition had not improved and he remained totally disabled. He noted that Claimant had been seen by two psychiatrists, Drs. Ganae and Conciatori, for anxiety and

depression due to the accident. He stated that family problems had aggravated this condition.

Dr. Musacchio submitted an additional letter dated September 9, 1996. (EX 27). He stated that he had been treating Claimant since April 13, 1992 and diagnosed brain concussion with post concussion syndrome associated with headaches and dizziness as well as a buzzing sensation in the head with bilateral hearing loss at high frequency levels and a severe loss at the lowest level. He also noted that Claimant sustained injury to the cervical spine and low back. Dr. Musacchio stated that Claimant's condition had not improved and he has a persistent buzzing in his head. Dr. Musacchio noted that the last time he examined Claimant was on September 4, 1996 and Claimant was extremely depressed due to lack of progress in his case and wished to relocate.

A deposition of Dr. Musacchio was taken on May 27, 1997.[1] (EX 55). Dr. Musacchio testified that he is board certified in general surgery and performs surgery two or three times a week. *Id.* at 4-5. He stated he had been treating Claimant since 1973 and had seen him for two assaults, two car accidents, diarrhea, acute lymphatitis due to work related injury, cough, cellulitis, herpes simplex, smoking cessation, a laceration to the right forearm, upper respiratory infection, removal of a mole, and the accident of 1992. *Id.* at 9-26. A car accident in 1978

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[1] A deposition of Dr. Musacchio taken on March 30, 1993 was submitted by Claimant posthearing. (CX 8). This deposition was previously submitted with the prior hearing in this case and will not be summarized as it does not address whether there has been a change in Claimant's condition.

resulted in a permanent condition involving the left forehead and Claimant's overall prognosis for this injury was poor. *Id.* at 18-19. The only permanent condition Claimant had prior to his 1992 accident was a loss of sensation above the right eye. *Id.* at 106. Dr. Musacchio also prescribed Valium for Claimant in 1993 and 1996 after Claimant telephoned the office. *Id.* at 22, 28.

Dr. Musacchio last saw Claimant for his work-related accident of 1992 on May 21, 1997. *Id.* at 34. At that time, Claimant's complaints were pain in the cervical spine, low back and left knee joint along with hearing loss and constant buzzing in his head. *Id.* at 35-36. An examination revealed spasm and pain in the movement of the neck in all directions. Claimant was able to flex forward about thirty degrees and lateral bending was fifteen degrees. *Id.* at 6. There was sensory loss to pinprick sensation in the lateral aspect of the left lower leg and the left knee showed mild crepitation. *Id.* at 37. He diagnosed Claimant with chronic lumbosacral sprain, chronic cervical sprain, post-concussion syndrome, which consisted of headache, dizziness, and buzzing in the head. *Id.* at 38. He found that this condition became permanent on August 31, 1994 and this is when Claimant reached maximum medical improvement. *Id.* at 107.

Dr. Mussachio stated that EMG's and nerve conduction studies would be helpful to determine Claimant's condition. However, he would not change his diagnosis if the EMG's were negative. *Id.* at 41. He further testified that if an EMG is normal, then he diagnoses a sprain. He was treating Claimant conservatively and he was not a candidate for any type of operation. Dr. Mussachio found that exercise was the most important thing for Claimant

to do because it allowed him to remain supple and helped to relieve pain. *Id.* at 42. Dr. Mussachio noted that Claimant's MRI's from February of 1994 noted disc bulging and there was pressure on the ligaments that hold the spine together. He stated that no herniated disc was found. *Id.* at 46-47. He stated that the MRI of the lumbar spine may have been normal according to Dr. James. Dr. Mussachio testified that he reviewed this with Dr. James and Dr. James indicated that a bone scan would be indicated. *Id.* at 47-48. Dr. Mussachio requested a bone scan just to see if there was any injury to the vertebral body but it was never done. *Id.* at 48. He stated that Claimant did not have any more degenerative arthritis than one would expect to see in an average worker. *Id.* at 50. His diagnoses of cervical strain and lumbar strain were based on complaints of pain. Dr. Mussachio stated that he referred Claimant to neurologists for his brain contusion and concussion and the tests they conducted were normal other than an audiogram which showed a hearing loss. He noted that if there were no permanent findings, then the brain concussion could have resolved. *Id.* at 55. He recommended a hearing aid to assist with Claimant's tinnitus. *Id.* at 55.

From a physical standpoint, Dr. Mussachio found that Claimant could not do any heavy lifting or stand on his feet for more than one hour. He noted that climbing, bending, kneeling, and crawling would be impossible. *Id.* at 72-72. He opined that Claimant would be able to do light duty work and it may sort of help him. *Id.* at 74. Dr. Mussachio stated that an EMG study would show whether there was nerve root irritation at the L4-L5 level. *Id.* at 77. He testified that Claimant's condition has

remained the same since his prior deposition in 1993. He stated that there were no nerves in the thecal sac so impingement on the thecal sac is not significant unless there is pressure on the ligaments. *Id.* at 93. He noted that persistent spasms as seen in patients with back sprains indicated pathology in the spine itself that is causing nerve root irritation. This can be proven by EMG tests and nerve conduction studies. With regards to Claimant's depression, Dr. Mussachio found that it was mainly referable to Claimant's marital problems and not to his physical condition or his inability to return to work. *Id.* at 101. He stated that one of the best things for Claimant would be to return to some type of light duty work. *Id.* at 113.

Fifty-eight reports by Dr. Mussachio, from April 13, 1992 through April 3, 1997, were submitted. (CX 1). The reports note that Claimant has pain and discomfort in the cervical spine, low-back, and left knee joint. They also note ringing in both ears with decreased hearing sensation, recurrent episodes of headache and dizziness, extreme apprehension and depression. Dr. Mussachio diagnoses a brain concussion, post concussion syndrome, post traumatic anxiety and depression, chronic cervical sprain, and chronic low back syndrome. Dr. Mussachio advises physical therapy and psychotherapy. He notes that Claimant is totally disabled and requests authorization for an MRI of the head, cervical spine and lumbosacral spine. He also requests authorization for hearing aids, an EMG and a nerve conduction study. No change was noted in Claimant's condition. Dr. Mussachio prescribed Valium, Vicodin. and Flexeril along with physical therapy. In his final report, Dr. Mussachio notes that the overall prognosis for improvement is poor.

A deposition of Dr. Robert Conciatori, who is board certified in psychiatry, was taken on May 25, 1997. (EX 56). Dr. Conciatori stated that he began treating Claimant on September 8, 1993 and has been seeing him once a month since. *Id.* at 22, 51. He noted that Claimant was injured when he fell backwards, struck his head, and lost consciousness. *Id.* at 48. He testified that Claimant is suffering from depression and would be incapable of working because of his depressive symptoms such as memory loss, lack of motivation, poor self-esteem, and difficulty concentrating. *Id.* at 16. Dr. Conciatori noted that Claimant had a subdued affect, in that he appeared depressed, had a sad facial expression and there was general slowing down of his physical reactions. *Id.* at 50. He stated that Claimant was diagnosed with major depression and currently takes Valium three times a day. Dr. Conciatori testified that he has tried several anti-depressants but they were not effective and he decided to treat him with psychotherapy. *Id.* at 17. He stated that after four years of therapy, Claimant's core symptoms have not improved and the stressors that made him depressed are still in place. *Id.* at 18. Claimant occasionally mentions suicide. *Id.* at 58. The basis for the depression were pain, inability to work and financial distress. *Id.* at 19. Dr. Conciatori stated that he provides supportive psychotherapy for Claimant which involves eliciting a patient's complaints to see how they are coping and offering guidance. *Id.* at 28. He also uses cognitive therapy. Dr. Conciatori stated that he felt that Claimant's depression was chronic and the prognosis was not very good. *Id.* at 37. He does not believe that Claimant's marital situation or inability to see his children causes him

any distress. *Id.* at 10. He stated that someone who is depressed will not be as socially active as others. *Id.* at 45. It was Dr. Conciatori's impression that Claimant spent most of his time at home. *Id.* at 46. He found that Claimant's condition has not improved and he requires supportive psychotherapy and medication.

The office notes of Dr. Conciatori were also submitted. (EX 5 1). Dr. Conciatori examined Claimant initially on September 9, 1994. He noted that Claimant suffered an injury in 1992 and had back, neck, and left knee injuries. Claimant's chief complaint was depression due to not working and finances. Dr. Conciatori found that Claimant's depression was not related to his marriage dissolving. He also noted somatic complaints, insomnia, and ringing in the ears. His notes reveal that Claimant continued to be depressed and Valium and Prozac were prescribed. Eight reports of Dr. Conciatori were also submitted. (CX 4). He noted that Claimant's condition was chronic and he remained depressed and in constant pain. He found that Claimant was totally disabled and stated that the disability was permanent.

Evaluating Physicians

The report of Dr. Emil C. Zuckermann, dated June 5, 1992 was submitted. (CX 2). The report was previously submitted in the prior decision and therefore will not be summarized again. Dr. Zuckermann stated the need for further diagnostic testing and noted that Claimant was totally disabled. Likewise, the report of Dr. Igor Stiler, dated July 9, 1992, was previously submitted. (CX 2). He found that Claimant had a moderately severe bilateral

conductive loss of hearing. He also noted a normal electronystagmography on July 9, 1992 and found that brainstem auditory evoked response investigation.

Dr. Randall James conducted an MRI examination of Claimant's brain and submitted a report dated February 14, 1994. (EX 21). The MRI revealed no abnormal signal intensity in the brain, no mass lesions, and no evidence of midline shift. Dr. James stated that brain volume and ventricular size were normal for a patient of Claimant's age. He found that there may be a small cyst within the pineal gland and there was moderate mucoperiosteal thickening of the sinuses. He concluded that this was a normal MRI of the brain and Claimant had pan sinusitis. Dr. James also conducted an MRI examination of the spine and submitted a report of these findings dated February 15, 1994. (EX 22). He concluded that there was slight straightening of the cervical lordosis which may be seen with positioning or muscle spasm and clinical correlation was recommended. He also found mild disc bulging at C5-5 level with flattening of the anterior aspect of the thecal sac. There was minimal disc bulging at C3-4 and C5-6 with minimal flattening. Dr. James stated that "[i]f further evaluation is desired or surgery is contemplated, a myelogram followed by CT is recommended."

An MRI examination of the lumbar spine was also conducted by Dr. Randall and he submitted a report dated February 22, 1994, detailing his findings. (EX 23). He found that there was mild disc degeneration at the L1-L2 level with a diffuse bulge present and a mildly compressed thecal sac. He also noted small disc bulges at L4-L5 and L4-S1 flattening the anterior aspect of the thecal sac at the L4-L5. Dr. James found that there was mild

hypertrophy of the apophyseal joints at the LS-S1 level and that there may be slight anterior wedging of the T12 and L1 vertebral bodies. He stated that these findings may by [sic] normal and correlation with plain films and nuclear medicine bone imagining was recommended.

Dr. Bernard Lerman, who is a general surgeon, examined Claimant on April 12, 1994. (EX 24). He stated that he had previously examined Claimant on November 11, 1992 and he reviewed the MRI done by Dr. James. He noted that Claimant had been injured in 1992 after falling from a box that was being lowered by a hi-lo. He found that Claimant's chief complaints were many and multiple, including constant headaches, dizziness, memory loss, low back pain occasionally radiating into the left leg, ringing in the ears, and hearing problems. A physical examination revealed normal ambulation and no Kyphosus, scoliosis, or lordosis. The neck was normal rotation and normal flexion and extension with no posterior neck spasm noted. There was normal abduction in both shoulders and normal range of motion in all modalities. Examination of the elbows, wrists, and hands were normal in all respects. Dr. Lerman concluded that there was no real evidence of disability with respect to Claimant's neck, shoulder, back, or extremities. He felt that Claimant should have returned to work months ago. In an additional letter dated September 13, 1994, Dr. Lerman opined that he could see no reason why a hearing aid was indicated and how it would alleviate ringing in the ears. (EX 26). He recommended that Claimant be seen by an ear, nose, and throat specialist.

Dr. William B. Head, who is board certified in psychiatry and neurology, examined Claimant on April 30, 1996.

(EX 28). He noted that Claimant, was injured when the box he was in was tipped and injured his left knee, head, neck and back. Claimant stated that he was taken to the hospital where he lost consciousness following "a big needle being put into a vein in my hand." Dr. Head noted that Claimant also claimed to have ringing in the ears which began immediately after the accident. Dr. Head also reviewed Claimant's medical records. He stated that currently, Claimant claimed he still had headache pain, low back pain, left knee pain, nervousness, depression, memory impairment, bilateral hearing impairment, and dizziness. Claimant reported that his physical complaints had remained the same since the accident. Claimant stated that his depression began one or two days after the accident due to the physical complaints he was having. Dr. Head noted that Claimant did not seek psychiatric care until 1993 when he saw Dr. Conciatori, a psychiatrist, whom he began seeing twice a month. Claimant stated that he currently sees Dr. Conciatori about once a month and Claimant currently takes Valium. Claimant also reported that he began experiencing memory impairment after the accident.

Dr. Head found that Claimant slept eight to nine hours a day, denied thoughts of suicide, denied any emotional problems at home despite a recent divorce and arrest for marital problems, and denies any prior history of depression. The examination revealed that Claimant was oriented to day, date, month, year and place and was a good historian, though Dr. Head noted Claimant appeared evasive about some part of his history. Claimant was able to concentrate and his motor skills were intact along with immediate, recent, and remote memory

recall functions. Speech pattern was normal and Dr. Head found no evidence of aphasia, dysarthria, or motor apraxia. Dr. Head diagnosed Claimant with symptom magnification syndrome, marital problems and noted otherwise there was an essentially normal psychiatric examination. He found no psychiatric basis for Claimant's reported total disability and no objective clinical psychiatric basis was found for any of Claimant's complaints. Dr. Head found that Claimant's original subjective psychiatric complaints were likely due to a combination of marital problems and to a lesser extent, to his work-related accident. However, Dr. Head stated that there was no lasting psychiatric disability or condition.

Dr. Head examined Claimant again on April 22, 1997. (DX 37). He noted that there was no change in Claimant's work history and that Claimant was currently taking Vicodin and Valium and at one time, took an anti-depressant but no longer does so. Claimant reported that he was more depressed, had more headaches, more left knee and back pain, and has more difficulty sleeping since Dr. Head last examined him. His current complaints were headaches, depression, neck pain, dizziness, low back pain radiating into the left leg, memory and concentration impairments, comprehension impairment, nervousness, ringing in both ears, trouble with balance, left knee pain, and decreased vision in both eyes. Claimant reported that he cannot drive on occasion due to dizziness and his right knee gave way last year causing him to fall. The examination revealed no sign of any cognitive impairment, anxiety, or depression. Claimant's ability to concentrate was intact and immediate, recent, and remote memory function remained intact also. There was no

evidence of aphasia, dysarthria or motor apraxia and affect was appropriate. Claimant had no evidence of any bizarre personal mannerisms and there was no evidence of psychomotor retardation or excitement, suicidal or homicidal ideation, mania, pressure speech or excessively depressive ideation. Dr. Head found that there appeared to be no objective physical or psychiatric basis for Claimant's total disability. Based upon the normal psychiatric evaluation, Dr. Head concluded that Claimant must have a strong need for dependency upon others. He diagnosed Claimant with symptom magnification syndrome and partner relational problems and found that he had passive/dependent personality traits. He found that Claimant had suffered no permanent psychiatric disability relative to his work accident of April 10, 1992 and there were no psychiatric limitations on Claimant's ability to work or engage in his usual and customary activities.

An additional letter was submitted by Dr. Head, dated June 16, 1997. (EX 61). He stated that he had reviewed the videotaped surveillance of Claimant as well as reviewing Dr. Conciatori's records. He stated that the tapes showed no evidence of depression and Claimant interacted with individuals appropriately. Claimant did not have trouble hearing others and appeared neatly groomed. He stated that there was no evidence of depression, physical discomfort, agitation, irritability, or sleeplessness. Dr. Head stated that he disagreed with Dr. Conciatori's diagnosis of major depression and noted that the diagnostic criteria for major depression were not met. He also stated that Claimant's prescription for Valium was inappropriate.

A deposition of Dr. Head was taken on June 24, 1997. (EX 65). He stated that the MRI scans are incredibly sophisticated and show that there is no nerve damage. *Id.* at 16. Without nerve damage, there is no basis for any pain. He stated that if Claimant is still claiming to have pain, that it is obvious that he is exaggerating. *Id.* at 16-17. In this case, he noted there was no evidence of any nerve damage whatsoever, there was no evidence that Claimant sustained a loss of consciousness, and there was a normal MRI of the brain. As far as depression, he felt that there was no objective evidence of depression and he found that it was unusual that Claimant was not prescribed anti-depressants given that there are thirty different types which can be used to treat individuals. The fact that Dr. Conciatori stopped prescribing them because they weren't doing any good was something that Dr. Head had not heard of before. *Id.* at 20-22. He stated that it seemed far-fetched for Dr. Conciatori to suggest that Claimant's marital problems did not have any affect on Claimant's psyche. *Id.* at 31. Dr. Head concluded that he found no basis for Claimant's depression and stated that Claimant had no psychiatric disability.

Dr. Robert Swearingen, who is a board certified orthopaedic surgeon, performed an orthopaedic examination of Claimant on February 21, 1996. (EX 29). He noted that Claimant suffered an accident on April 10, 1992 when the box he was riding in turned over. Dr. Swearingen noted that the first x-rays after the injury noted degenerative changes of the neck and spine and were normal of the right shoulder and left knee. He noted that Claimant's current complaints were pain in the lower

back, ringing in the ears, and that his neck is still sometimes painful when moving. Dr. Swearingen reviewed the reports of Drs. Musacchio, Berman and Zuckerman along with the radiological studies from the emergency room and the MRIs. A physical examination revealed a variable gait with no consistent recognizable antalgic gait, the head was carried forward and flexed, as is commonly seen in degenerative spine disease. There was pain with pressure of the bony prominences of the neck but no muscle spasm was noted. There was normal range of motion in the neck during the history taking, but during the examination neck motion was limited to fifteen degrees of rotation and twenty degrees of flexion. Dr. Swearingen found that Claimant had a full range of motion in his shoulder and back range of motion was limited to forty-five degrees. There was pain noted in the back. Claimant's knee brace showed no signs of wear and full range of motion was present in the knee, though vague pain was noted. Dr. Swearingen found that there was no current objective evidence of causal disability and based upon his examination, Claimant could work. He found that Claimant did not require treatment and that studies showed degenerative changes in the spine before the incident in question.

Dr. Swearingen performed a repeat examination on April 15, 1997. (EX 31). Claimant stated that nothing had gotten better and he had pain in his left knee, back, and ringing in the ears. Dr. Swearingen found that Claimant appeared the same as on the last exam and still had stilted gait which followed no antalgic pattern. There was full range of motion in the neck without pain except in

flexion and there was no pain in the shoulder. An examination of the back revealed mild increased dorsal Kyphosus and there was pain with light touch along with sixty degrees of motion. The knee examination revealed a restricted flexion slightly on the left side and Claimant complained of pain in the knee. Dr. Swearingen concluded that there were no objective findings other than pre-existing degenerative changes and no disability exists.

At the hearing, Dr. Swearingen testified as to Claimant's condition. He reiterated the finding contained in his written report and stated that three tests developed by Dr. Waddell showed that Claimant's pain did not have a physiological or anatomical explanation. (TR 122-131). He found that Claimant could return to work and did not require further treatment. (TR 135). Dr. Swearingen noted that the MRI showed degenerative changes and some bulging but most importantly there was no cord or nerve root pressure. (TR 145). He reviewed a videotape of Claimant working on his car and stated that it did not indicate any type of back problem. (TR 153-156). He indicated that Claimant had a normal gait with reciprocal motion. (TR 157). He stated that if a person had a back condition of any significance at all, he would not be able to do the things Claimant was doing on the tape. (TR 173). Dr. Swearingen stated that Claimant admitted to a prior back injury in 1982 when he was hospitalized for approximately two months with traction. (TR 178). It was his opinion that Claimant had no disability irrespective or [sic] cause but he did believe that Claimant had degenerative spine disease which he found was unrelated to the accident. He stated that degenerative spine disease can be

affected by a subsequent trauma. (TR 192). Dr. Swearingen stated that even with arthritis, Claimant could do longshoreman work. (TR 199). He noted that the MRI showed a bulge that the x-ray did not pick up. (TR 2020).

Claimant was examined by Dr. Alvin Katz, who is board certified in otorhinolaryngology, on April 28, 1997. (DX 33). He noted that Claimant suffered an injury on April 10, 1992 when he fell from a U-shaped box. Dr. Katz noted that Claimant was examined by Drs. Raia and Stiler, both of whom noted a hearing impairment. Dr. Katz stated that Claimant was also seen by Drs. Head, Conciatori, Musacchio, Perroti, Zuckerman and Swearingen. Claimant's present complaints were decreased hearing in both ears and intermittent ear noise which began one or two weeks after his accident. Dr. Katz conducted a tuning fork test which showed no lateralization and rinne tests were positive to all frequencies tested bilaterally. An audiogram revealed a high frequency, hearing drop with normal low and mid-frequency hearing bilaterally. Adequate middle ear pressure was noted and Claimant's speech reception was normal with good discrimination. Dr. Katz determined that there was a 5.6% hearing impairment on the right and 13.1% hearing impairment on the left for a binaural impairment of 6.9%. There were no cranial nerve abnormalities, no spontaneous or positional nystagmus or sway on sharpened Romberg testing. Claimant had no evidence of any inner ear to middle ear fistula and an examination of the nose, throat and head and neck areas was negative.

Dr. Katz found that Claimant had a full range of motion of his neck and good flexion and extension. He

concluded that Claimant had a high frequency sensorineural hearing drop with a minimal percentage hearing loss binaurally. This small amount of hearing loss can be the cause of the tinnitus which is self-limiting and can be suppressed. Dr. Katz stated that Claimant should be able to perform work and requires no further management and stated that a hearing aid may benefit Claimant's hearing ability in high frequencies. Claimant stated that he was no longer bothered by any balance disturbances. Dr. Katz submitted an additional letter dated May 8, 1997 in which he stated that he reviewed the July 31, 1995 report of Dr. Musacchio. (EX 38). He stated that tinnitus is in no way affected by the use of a hearing assistive device. He also noted that Claimant's speech reception threshold did not dictate that use of a hearing assistive device for amplification of sound.

Dr. Michael Heublum performed a nerve conduction study of Claimant on June 3, 1997. (DX 42). Dr. Heublum is board certified in internal medicine, psychology and neurology, and electrodiagnostic medicine. The test was conducted on the median, ulnar, and radial nerves in the upper extremities and on the peroneal and tibial motor nerve in both lower extremities. He found that the nerve conduction studies were essentially normal. Claimant was unable to tolerate the concentric needle examination due to anxiety and a phobia of needles. In a follow-up letter dated June 4, 1997, Dr. Heublum stated that Claimant asked that he stop the concentric needle EMG examination after the second insertion of a needle. (EX 43). Dr. Heublum believed that Claimant has a severe phobia of needles which is a psychological fear. He stated that the likelihood that the needle EMG would be positive was

very low based upon the essentially normal neurological findings, essentially normal MRI films, and the normal nerve conduction studies.

Dr. Bruce C. Zablow, whose qualifications are not contained in the record, reviewed Claimant's MRI examinations of the cervical and lumbar spines from February of 1994 along with Dr. Swearingen's reports. He also reviewed the reports of the MRI scans prepared by Dr. James. He found that the MRI of the cervical spine showed a minimal narrowing of the intervertebral disc space at the C4-5 level with a slight degree of diffuse disc bulging. There was no spinal cord compression identified or lateralizing nerve root compression. He concluded that there was a mild reduction of the normal cervical lordosis centered at the C4-5 level with a slight reduction of height of the C4-5 disc. There was minimal encroachment by the posterior disc annulus on the ventral subarachonoid space not associated with any spinal cord or demonstrable nerve root compression.

The examination of the lumbar spine MRI revealed diminished height and hydration of the L 1-2 disc associated with generalized disc bulging and a right sided posterolateral disc protrusion. There was no identifiable isolated nerve root compression. Dr. Zablow noted that there was a minimal decrease in discal hydration and a minimal decrease in discal height at L4-5. Mild hypertrophic degenerative changes were noted. Dr. Zablow stated that medical reports revealed that an x-ray taken the day of the accident revealed degenerative changes.

X-rays of the cervical spine obtained the date of the accident revealed that the soft tissue was normal, and

normal cervical lordosis was seen. (CX 3). Degenerative changes were noted with small C4, C5, and C6 posterior ostephyte formation. X-rays of the left knee were also normal. X-rays of the lumbosacral spine revealed mild narrowing of the L4-L5 disc space.

Vocational Assessment

A vocational assessment of Claimant was performed on May 21, 1997, by Sharon Levine, a certified rehabilitation counselor for SML Rehabilitation Consultants. (EX 40). She has a master's degree in counseling psychology and is a certified disability management specialist. She noted that Claimant was lethargic with weak voice and could not hear what she was saying when she first entered the room. However, during the testing, his posture became strong and he had no difficulty understanding her. Claimant's complaints were headaches, dizziness, lack of sleep, back pain, and tinnitus. He was a high school graduate and worked as a longshoreman from 1979 until his accident in 1992. The vocational assessment consisted of a Self Directed Search to determine vocational interests and an Employee Aptitude Survey to identify skills. She noted that Claimant marked his answer sheet incorrectly on the Employee Aptitude test despite calling out the correct answers. She found that Claimant did not understand the concept of the spatial relation testing. Claimant's verbal comprehension test scores were low but his performance levels were average. He could not utilize any other type of math other than basic math. A Wunderlic Personnel Test was administered and Claimant scored a 13 which was lower than what he demonstrated in his vocational, educational, and personal

life. Ms. Levine found that Claimant's work skills transferred to several other occupations including assembling, transportation, stone, clay and glass products work, and structure work. She identified forty jobs in the New York area that Claimant would be able to perform. She also found that Claimant would be able to be a cashier and noted that one company in the area was currently hiring cashiers. Ms. Levine concluded that after a review of the medical records and the evaluation, Claimant was a symptom magnifier who is physically and intellectually capable of higher levels of employment than those identified. She found that there were 44 jobs which would accommodate the restrictions imposed by Dr. Mussachio. She stated that Claimant's earning capacity was at least $210.00 per week.

Ms. Levine also testified at the hearing. She testified that it was unusual that Claimant's father attended the testing and she noted that the father would frequently remind her how disabled Claimant was. (TR 212-213). While giving Claimant a test, she changed the timbre of her voice and Claimant had no difficulty hearing her. (TR 213). She felt that Claimant was intentionally trying to overstate his symptoms. (TR 215). She stated that Claimant appeared much differently in the videotapes than he did during her examination. (TR 216). She stated that she used the work restrictions as provided by Dr. Mussachio but felt that Claimant was physically able to do more. She found that Claimant would be able to assemble fiberglass filters and noted that there were ten companies that did this type of work in the area. (TR 240). She also found that there were available jobs as a cashier or counter person which were considered sedentary work. (TR 241).

She stated that the $210 per week figure for earning capacity that she arrived at was very low and was on the low end of the pay spectrum for cashier jobs. (TR 248-249).

Surveillance Tapes

Four days of surveillance tapes of Claimant were submitted. (EX 54). The tapes show Claimant going into various stores, working on his car, and climbing stairs. Claimant is seen changing hub caps on his car and carrying automotive parts.

Deposition Testimony of Denise Degal

A deposition of Ms. Degal was taken on July 23, 1997. (EX 66). She testified that Claimant is her ex-husband and she was married to him from 1978 until 1994. They have three children from the marriage. *Id.* at 3. She described the divorce as very bitter and stated that Claimant was violent. *Id.* 4-5. She obtained restraining orders against Claimant and he was arrested several times. *Id.* at 5-8. Claimant filed complaints against her with Child Welfare. *Id.* at 10.

Affidavit of Julie Cialdella

The affidavit of Julie Cialdella was submitted post-hearing (Ex 67). Ms. Cialdella alleges that she had a relationship with Claimant beginning in October of 1990 and ending in June of 1993. She stated that Claimant performed all types of physical activities despite claiming he was disabled and worked at various auto body shops,

off the books, at least five days a week. She also alleged that Claimant was violent towards her and she filed several criminal complaints against him.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Sargent v. Matson Terminal, Inc.*, 8 BRBS 564 (1978); *Brandt v. Avondale Shipyards, Inc.*, (BRBS 698 (1978); *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 454 (1968), *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (4th Cir. 1962).

Modification

Modification based on a change in condition is granted where the Claimant's physical or economic condition has improved or deteriorated following entry of an award of compensation. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). The party requesting modification due to a change in condition has the burden of showing the change in condition. *See Vasquez v. Continental Maritime*, 23 BRBS 428 (1990). In this case, the prior decision established that Claimant was temporarily totally disabled. (EX 8). An Employer may seek modification based on a change of condition by showing that Claimant's temporary total disability has become a permanent disability or Claimant no longer has a disability. *Hoodye v. Empire/*

United Stevedores, 23 BRBS 341 (1990). The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. *Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130 (1974).

All of the physicians who offered opinions in this matter established that Claimant's condition is not improving and the future prognosis for improvement is poor. Claimant's treating physician, Dr. Mussachio, found that Claimant had reached maximum medical improvement on August 31, 1994. Accordingly, Claimant no longer has a temporary disability. Therefore, a change in condition has been established. The remaining question is whether Claimant has a permanent disability, and if so, to what extend does he have such a disability. The standard for determining disability is the same for a Section 22 modification proceeding as it is for an initial proceeding under the ACT. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Extent of Disability

Total disability is defined as a complete incapacity because of injury to earn the wages that the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). The employee bears the initial burden of proving that he cannot return to his regular or usual employment due to his work-related injury. If the employee satisfies this burden, the burden shifts to the employer to establish the existence of suitable alternate employment. *Trans-State Dredging v. Benefits Review Board*, 732 F.2d 199 (4th Cir. 1984), *rev'g*

Tarner v. Trans-State Dredging, 13 BRBS 53 (1980); *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762 (4th Cir. 1979).

"Usual" employment is the employee's regular duties at the time that he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Even a minor physical impairment can establish total disability if it prevents the employee from performing the usual employment. *Elliott v. C&P Telephone Co.*, 16 BRBS 89 (1984). A physician's opinion that the employee's return to his usual work would aggravate his condition is sufficient to support a finding for total disability. *Lobue v. Army & Air Force Exchange Service*, 15 BRBS 407 (1983); *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257, 261 (1978).

Once the employee has shown that he is unable to perform his usual employment because of the work-related injury, the burden shifts to the employer to demonstrate the existence of realistically available job opportunities within the geographical area whether [sic] the employee resides, which the employee is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging v. Benefits Review Board (Tarner)*, 731 F.3d 199 (4th Cir. 1984); *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991). The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical employment opportunities by identifying specific jobs available to the employee within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042 (5th Cir. 1981).

Total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *Palombo v. Director, OWCP,* 937 F.2d 70 (2nd Cir. 1991). From the date of maximum medical improvement to the date suitable alternate employment is shown, the claimant's disability is total.

In this case, Claimant alleges that he cannot return to his usual employment due to continuing back pain, neck pain, left knee pain, depression, memory loss, hearing loss and tinnitus. Complaints of pain, in and of themselves, may be sufficient to meet Claimant's burden that he cannot return to his usual employment. *Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Richardson v. Safeway Stores,* 14 BRBS 855 (1982). However, an administrative law judge may find that an employee is able to perform his usual employment despite complaints of pain when a physician finds no functional impairment. *Peterson, v. Washington Metro. Area Transit,* 13 BRBS 337, 339 (1983). Dr. Mussachio, Claimant's treating physician, repeatedly advised that Claimant undergo an MRI as it would reveal the cause of his back problems. Dr. Randall who conducted the test noted that there was mild disc bulging in the cervical spine and lumbar spin [sic]. He concluded that the findings may be normal and clinical correlation was recommended. Dr. Lerman, a general surgeon, conducted a physical examination of Claimant in 1994 which he stated was normal in all aspects. Dr. Swearingen, who is a board-certified orthopaedic surgeon, concluded that there was no objective evidence of disability. He stated that there were degenerative changes but Claimant had full range of motion and could return to work. Three tests which determine whether Claimant's

pain has anatomical or physiological origins revealed that it did not. No other doctor performed these tests. Nerve conduction studies performed by Dr. Heublum verified these results as he noted that the studies were essentially normal. Dr. Zablow who reviewed the MRI, also found that there was no nerve root compression. Even Dr. Mussachio testified that there was no herniated discs and based his diagnosis solely on Claimant's pain. Accordingly, as testing designed specifically to determine the origin of claimant's pain did not reveal that it was related to any functional impairment. I find that Claimant no longer has a back injury which would prevent him from performing his usual employment.

Claimant also alleges psychiatric problems. The initial determination that Claimant had psychiatric problems was based upon Dr. Mussachio's opinion as he was the only physician in the initial record who found Claimant suffered from depression. Dr. Mussachio's current opinion is that Claimant's depression is due to family problems and not his inability to work. Dr. Head, an examining psychiatrist and neurologist, found that Claimant's psychiatric problems were due to a combination of marital problems and to a lesser extent to his work-related accident. However, he found that there was no lasting psychiatric disability or condition. Dr. Conciatori, who has been treating Claimant since the prior decision, found that Claimant had major depression due to pain, inability to work and financial distress. However, the record indicates that Claimant's own physician found that he can return to light-duty work and Claimant's financial situation is no different post-injury than pre-

injury. Dr. Conciatori did not believe that Claimant's marital problems played any role in his depression.

I do not find Dr. Conciatori's opinion to be credible, despite the fact that he has been treating Claimant since 1993, as his records were incomplete and he used circular logic. He stated that Claimant's inability to work led to his depression and due to his depression, Claimant could not work. (EX 56 at 30-33). In addition, his opinion was based upon assumptions about Claimant's financial status that were not accurate. Despite Claimant's own admission that his divorce was very difficult and that multiple allegations of abuse and child neglect were filed and Claimant no longer sees one of his children, Dr. Head did not believe that any of Claimant's depression was due to his marital problems. In light of the other physicians' opinions, I find this to be incredible. I find Dr. Head's opinion to be more credible and more consistent with Claimant's demeanor at trial, during testing, with examining physicians, and on the videotapes. Accordingly, I find that Claimant initially was depressed due to his injury, but he currently does not suffer from depression due to this accident.

Claimant also alleges a memory loss. However, he had not shown any objective evidence of such a loss. He had no difficulty recollecting specific events when questioned by his own counsel and there was no evidence that he suffered any type of lasting trauma to the head. Dr. Head noted that Claimant was able to concentrate and had immediate, recent, and remote memory recall functions. This is consistent with the testing that was given by the vocational counselor. Dr. Conciatori found that

Claimant had memory loss, but his records do not indicate that he performed any type of testing to discover the type of memory loss or to uncover a cause for the memory loss. Accordingly, little weight is given to his opinion. Dr. Mussachio did not diagnose memory loss and his office records do not note any such problems. Accordingly, I find that any memory loss suffered by Claimant has resolved.

Claimant also alleges a hearing loss. An audiogram conducted by Dr. Katz, who is certified in otolaryngology, revealed a 6.9% biaural hearing loss. This evidence is uncontested and it was previously determined that Claimant's hearing impairment arose from his accident. Dr. Katz recommended hearing aids to assist with Claimant's hearing at high frequencies. He also found that this level of hearing loss could cause tinnitus. All other doctors of record noted that Claimant complained of a constant ringing in the ears. Dr. Mussachio stated that a hearing aid would also assist with tinnitus. However, Dr. Katz found that Claimant's speech reception threshold did not require a hearing aid for amplification of sound and a hearing aid would not assist with tinnitus. Accordingly, while I find that Claimant suffers from a 6.9% hearing loss and order the Employer to pay for hearing aids to assist with his high frequency hearing, there is no evidence to suggest that his hearing loss or tinnitus would prevent him from performing his usual employment as his ability to hear spoken conversations is not affected.[2] This is especially true when considering that he

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[2] There was some discrepancy among physicians as to whether a hearing aid would assist Claimant's tinnitus. As a

will be provided with a hearing aid assist with high frequency hearing.

Claimant stated that he injured his left knee. X-rays taken the day of the accident were normal. Dr. Mussachio noted sensory loss to pinprick sensation in the left leg along with mild crepitation. A physical examination conducted by Dr. Lerman was normal. Dr. Swearingen, who is a board certified orthopaedic surgeon, found full range of motion in the knee and noted that Claimant's knee brace was not worn. He also found that Claimant's gait was not a recognizable antalgic gait. A second examination revealed restricted flexion slightly on the left side. Dr. Swearingen found that Claimant could still do longshoreman work and he stated that Claimant had a normal gait with reciprocal motion. Based upon Dr. Swearingen's superior qualifications and Claimant's diagnosis of symptom magnification, I do not find his subjective complaints of pain in his left knee sufficient to prevent him from returning to his usual employment.

Accordingly, even when reviewing all of Claimant's symptoms as a whole, I find that he is now able to return to his usual employment. Therefore, he is not eligible for continuing benefits.[3] The Employer is entitled to a credit

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hearing aid is ordered for his hearing loss, this issue does not need to be addressed.

[3] By virtue of finding a change in conditions had occurred and Claimant was no longer entitled to benefits, it was not necessary to address whether a mistake in fact occurred. However, such an analysis would have yielded the same result based upon the newly submitted evidence.

for benefits paid since the date of maximum medical improvement, August 31, 1994.

Dr. Conciatori 's Fee

Pursuant to a subpoena requested by the Employer, the deposition testimony of Dr. Conciatori was taken on May 25, 1997. Dr. Conciatori submitted a bill of $1,725 for his deposition testimony which apparently lasted approximately one and a half hours. Employer paid Dr. Conciatori a fee of $40.00, stating that Dr. Conciatori was not an expert witness but a fact witness and the federal witness fee is $40.00. I find the $1,725 fee to be unreasonable considering that Dr. Conciatori's deposition was required due to his lack of office records. However, a fee of $40.00 also does not adequately compensate the doctor for his time. Accordingly, I am awarding him a fee of $450.00 which would be the equivalent to an hourly rate of $300.00 for one and a half hours. This should adequately compensate Dr. Conciatori for his time.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Employer is to pay for a hearing aid for Claimant.
2. Employer is entitled to a credit for payments made to Claimant from the date of maximum

medical improvement, August 31, 1994 to the final payment.

3. Claimant is not entitled to continuing benefits under the Act.

4. Employer is ordered to pay Dr. Conciatori $450.00 for his deposition.

/s/ Paul H. Teitler
PAUL H. TEITLER
Administrative Law Judge

JAN 15, 1998
Camden, NJ
PHT/cls